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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. 805

WILLIAM FRASER, ET UX., Petitioners

VS.

P. M. BARTON, ET AL., Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

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THE DAILY NEWS

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Received of Wils Davis, Solicitor for Petitioners Mr. and Mrs. William Fraser one copy of the Court Record, three copies of their Petition for Certiorari and Brief and Argument, together with notice of the filing of same, as required by the rules of the Supreme Court.

This the 28th day of December, 1944.

WILLIAM McCLANAHAN,

U. S. District Attorney.

.....

Memphis, Tennessee.

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VS.

P. M. BARTON, ET AL., Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Petitioners, William Fraser, and wife, Mrs. William Fraser, or Katie Fraser, pray this Court for a writ of certiorari to review judgment of the United States Circuit Court of Appeals, for the Sixth Circuit, in consolidated causes there entitled, William Fraser vs United States; Mrs. William Fraser vs. United States; and P. M. Barton et al. vs. United States et al. R. pp. 975-976. In the United States District Court of Memphis, Tenn.,

P. M. Barton on behalf of himself and others sued William Fraser et al, and the United States intervened. R. pp. 3-9-10-20.

The opinion and judgment of the Circuit Court of Appeals, entered October 3, 1944 affirmed a judgment of the district court holding William Fraser and his partner, G. H. Britton, jointly and severally liable to the United States for $55,762.14, as penalty on 1,833 bales of cotton, purchased by them from the Three-Way Land Company, a corporation, of which P. M. Barton was president, on the ground that the cotton was grown by the seller in excess of allotment under the 1938 Agricultural Adjustment Act, as amended, 7 U.S.C.A. 1348. R. pp. 161-169. The judgment also allowed recovery against Fraser and Britton, of $12,971.00, balance of purchase price of this 1,833 bales, plus 20 bales not subject to penalty, in favor of P. M. Barton, and a number of tenants in whose behalf he had sued. R. p. 166.

FEDERAL STATUTES INVOLVED

7 U. S. C. A. 1348:

> "Any farmer who, while farm marketing quotas are in effect, markets cotton in excess of the farm marketing quota for the marketing year for the farm on which such cotton was produced, shall be subject to the following penalties with respect to the excess so marketed; two cents per pound if marketed during the first marketing year, when farm marketing quotas are in effect; and three cents per pound if marketed during any subsequent year.——".

7 U. S. C. A. 1372:

> " (a) The penalty with respect to the marketing, by sale, of wheat, cotton or rice, if the sale is to any person within the United States, shall be collected by the buyer.
>
> (b) All penalties provided for in Sub-title B shall be collected and paid in such manner, at such times, and under such conditions, as the Secretary may by regulations prescribe. Such penalties shall be remitted to the Secretary by the person liable for the penalty, except that if any other person is liable for the collection of the penalty, such other person shall remit the penalty. ***."

Further, Section 9, of Joint Resolution relating to corn and wheat marketing quotas under the Agricultural Adjustment Act of 1938, as amended, No. 74, 77th Congress, May 26, 1941, provided:

> "The marketing penalty for cotton and rice produced in the calendar year in which any marketing year begins (if beginning with or after the 1941-42 marketing year) shall be at a rate equal to fifty per centum of the basic rate of the loan for cooperators for such marketing year under Section 302 of the Act, and this Resolution."

This was established as follows:

> " (10) The Commodity Credit Corporation is directed to make available upon the 1941—crops of the commodities cotton—for which producers have not disapproved marketing quotas for the marketing year beginning in the calendar year in which such crop is harvested, loans as follows:
>
> (c) To non-cooperators—at the rate of sixty

percentum of the rate specified in (a) above, and only on so much of the commodity as would be subject to penalty if marketed." 7 U. S. C. A. 1340.

Pursuant to the above paragraph or Section (9), the Secretary of Agriculture, by regulation, established the rate of penalty for the 1941-1942 excess marketed, at 7c. per pound. R. p. 719. It was on this basis that the amount of the judgment was determined. The cotton was grown in the 1941-42 season.

SUMMARY STATEMENT OF THE MATTER INVOLVED

William Fraser and G. H. Britton were partners, engaged in the cotton business in Memphis, under the firm name of G. H. Britton Cotton Company, and in April, 1942, contacted the Three-Way Land Company, a corporation, at Catron, Missouri, through its president, P. M. Barton, offering to sell for that company its snap cotton, on which it then had a loan with the Mid-South Cotton Growers Association in Memphis.

By letter of April 2, 1942, the Memphis Company made an offer to the Missouri Company to try to sell its cotton for it at 15 1/2c. a pound. R. pp. 569 and 570. This offer was declined and all negotiations terminated by letter of April 6, 1942, from the Missouri Company to the Memphis Company. R. p. 572.

However, about April 20, 1942, samples of the cotton were delivered to the Memphis Company, and negotiations were reopened, but the Memphis Company stated in its letter acknowledging receipt of these sam-

ples, "*We cannot tell about what the cotton will bring at this stage of our work.*" R. p. 574.

So up to this time no contract had been attained between the parties, though both the courts have based their holdings on the theory that the letter of April 2, 1942, was the contract. R. pp. 944, 945, 977 and 978.

On April 24, 1942, William Fraser, for his Company, sought and obtained an option on 3,000 bales of the cotton, as evidenced by a letter of confirmation, from G. H. Britton Cotton Company to the Three Way Land Company, dated April 24, 1942, from which we quote:

> "Will confirm option given us today on 3000 bales your snap cotton at $7 per bale above loan value, good until Tuesday, April 28th. With the privilege of taking 1,000 bales and/or 2,000 bales and/or 3,000 bales.
>
> *We are not interested in any Government tax.*" R. p. 481.

* * * * *

Barton first testified that "above loan value" meant above the loan to the Mid-South, and above the penalty or tax. R. pp. 564-565. But Barton later admits it meant simply above the outstanding loan (R. pp. 671-675), and then stated that he did not know what was meant by "above loan value," in the above quoted letter. R. p. 675. We quote the latter:

> Q. What he meant by "above loan value," was the amount that had been borrowed on the cotton?
>
> A. I don't know what he meant?. R. p. 675.

Anyway, seasonable objections to the admissibility of such oral testimony in variance of the written contract were made. R pp. 567 and 569.

Both Fraser, and his bookkeeper, who heard the telephone conversation, testify in confirmation of the written contract, that Barton's company was to pay the Government tax. R. pp. 485, 486, 705 and 735.

The above quoted letter of April 24, 1942, was the basis for all purchases which ensued. We quote briefly from the several letters confirming orders:

Apr. 27, 1942 "1,000 bales your snap cotton at $7 per bale above loan value." R. p. 484.

May 5, 1942: "400 bales your cotton at $8 net per bale above 1941 loan value." R. p. 581.

May 8, 1942: "100 bales snaps at $7 per bale net to you." R. p. 582.

May 11, 1942: "200 bales of cotton at $7 per bale above loan value net to you." R. p. 582.

May 14, 1942: "100 b/c at $7 net above loan value 125 b/c at $6 above loan value." R. pp. 492, 583.

May 18, 1942: "450 bales at $6 per bale above loan value." R. p. 647.

There were no other sales than the above. 2375 bales were ordered; only 1853 delivered R. pp. 3-9. Cross-bill was filed for failure to deliver the deficiency, 522 bales. R. p. 73.

G. H. Britton Cotton Company sold the cotton deliv-

ered, and were preparing checks for remittance to Three-Way Land Company, when Barton enticed Fraser to Catron, Missouri, where Barton filed suit against Fraser, and his partner, Britton, suing in the name of the Three-Way Land Company, only. R. pp. 197-201, 332 and 333.

When this happened, naturally Fraser and his firm discontinued remittances to the Three-Way Land Company. R. p. 335.

Afterwards, in November, 1942, P. M. Barton instituted the instant action by a suit in the United States District Court at Memphis, suing in his own name, and in behalf of the Three-Way Land Company, and also suing in behalf of some 62 sharecroppers. R. pp. 3-9 and 17. The complaint alleged these sharecroppers owned three-fourths interest in the cotton, and claimed that Fraser's firm had sold the cotton for the owners, and should account for the proceeds, pay the government tax, and pay the balance due to the owners, avering the letter of April 2, 1942, to be the contract. R. pp. 3-9.

It is noted that while the complaint alleges defendants took the cotton as selling agents, this theory is later abandoned, and instead plaintiffs concede it was an outright sale. R. pp. 537 and 584.

December 3, 1942, the United States filed its intervening petition, making all prior parties, defendants, suing them all for its tax or penalties on the cotton. R. pp. 10-20. Without securing an attachment, the suit sought by use of injunctions to restrain Fraser and his wife, from entering certain safety deposit boxes. Quite a big to-do was made about this, and the boxes were opened and nothing found therein. R. pp. 10-22 and 80.

Then the Government's attorney, conceiving that Federal Rule of Civil Procedure No. 26, provided the equivalent of a chancery bill of discovery, subpoenaed Fraser to testify, under said rule. R. pp. 28 and 30. Motion by Fraser to vacate this subpoena was overruled, and Fraser's deposition was taken, Dec. 15, 1942. R. pp. 28-30, 44-51 and 323.

As certain Tennessee statutes are involved at this juncture, we quote the same for the convenience of the Court:

CHANCERY BILL OF DISCOVERY

1932 Tenn. Code, Sec. 10353:

> "*The creditor whose execution has been returned unsatisfied,* in whole or in part, may file a bill in Chancery against the defendant in the execution, and any other person or corporation, to compel the discovery of any property, including stocks, choses in action, or money due to such defendant, or held in trust for him, except when the trust has been created by, or the property so held has proceeded from, some person other than the defendant himself, and the trust is declared by Will duly recorded or deed duly registered."

TESTIMONY OF HUSBAND OR WIFE

Tenn. Code, Sec. 9777:

> "In all civil actions, no person shall be incompetent to testify because he is a party to, or interested in, the issue tried, or because of the disabilities of coverture, but all persons, including husband and wife, shall be competent witnesses, *though*

> *neither husband nor wife, shall testify as to any matter that occurred between them by virtue of or in consequence of the marital relation.*"

FEDERAL CIVIL PROCEDURE RULE No. 26.

This rule provides for the taking of depositions, pending an action, and in its first section, (a), provides among other things that depositions may be taken, "for the purpose of discovery," as a means of enabling a party to establish his case.

Its second section limits the scope of examination:

> "(b) Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, *not privileged*, which is relevant—"

Now what happened was this, that the Government's attorney, in seeking collection of the tax, instead of bringing a simple suit against the Three-Way Land Company, a perfectly solvent corporation primarily liable as grower and first purchaser, as stated conceived that the phrase "for the purpose of discovery" found in Federal Civil Procedure Rule No. 26, is the equivalent of the provisions for a discovery of property made in the Tennessee Chancery Statute available to a judgment creditor; and, though no one at the time had a judgment, and issues had not been joined, the Government proceeds as if it were in the role of a judgment creditor, using process available only after a judgment is secured. In this way Fraser is put on the witness stand and plied with questions as to the whereabouts of monies, and compelled to answer by mandatory order of the court. R. p. 55.

The witness himself, expressly claimed the benefit of the privilege provided by the Tennessee statute, that his answer would involve confidential communications between himself and his wife. R. pp. 370, 373, 379, 382, 384, 385, 387, 388, 396 and 402. Despite this he was required to answer. R. p. 55.

The witness, thus under constraint of the court, answered that he had delivered the monies to his wife. Whereupon the taking of his deposition was abruptly suspended, and the Marshal sent with an instanter subpoena for Mrs. Fraser, who was brought into court thirty-five minutes later (R. pp. 394 and 395), and required to testify, over objections by Fraser, and without opportunity to consult counsel, or to be advised of her rights (R. pp. 396, 397, 400-402), and was questioned about matters and transactions between her husband and herself. (R. pp. 403 and 404), and testified that she had monies on her person. Whereupon, she was hailed before the court and required to turn the monies over to the clerk of the Court, and she thus surrendered possession of $27,000.00 in cash, and $2500 in Government bonds. All this being done over the vigorous objections of Fraser. R. pp. 409, 411, 412, 416, 419, 420 and 423.

These funds were by the judgment of the court applied to the discharge, pro tanto, of the Government's judgment for the penalties. R. p. 159.

The district court found as facts that the contract was in the alternative, that Barton was to receive either $7 a bale, after payment of the loan, and the tax, or to receive 15 1/2c a pound, and the tax money to be put in escrow; that the Three-Way Land Company was dis-

solved as a corporation on July 27, 1942, and P. M. Barton, R. L. Taylor and H. Highfill owned the assets, and as such, owned one-third interest each in one-fourth of the cotton, the other three-fourths of the cotton being owned by the 62 sharecroppers. That G. H. Britton Cotton Company had sold the cotton and received the money therefor, and owed all the plaintiffs, including the sharecroppers, $12,971.00, being $7 a bale on the 1853 bales; and that all the parties, the plaintiffs, and Britton and Fraser jointly and severally owed the Government the tax, $55,762.14, and that the monies and funds in the hands of the clerk, including that taken from Mrs. Fraser should be applied to the judgment. The cross-bill of Britton and Fraser for failure to complete delivery of the other 522 bales, was dismissed. R. pp. 146-169.

Though errors were assigned and partially conceded in the Circuit Court of Appeals, that court affirmed the judgment of the district court, refusing to disturb its judgment for recovery, and to return the funds taken from Mrs. Fraser. Mrs. Fraser had intervened in a petition seeking the return of the monies taken from her. R. pp. 979, 987, 114.

Designation of errors by Fraser and Mrs. Fraser. R. pp. 179, 187.

STIPULATION OF FACTS

We here quote paragraph 2 of the stipulation of facts filed in the cause:

> "That the cotton involved in this suit, to-wit, 1853 bales aggregating 805,387 pounds was grown, produced and marketed from and on lands owned,

> farmed and operated by the original plaintiffs in this cause, the amount of cotton owned by each individual plaintiff and the tabulation of their respective interest therein being set out in instruments attached hereto and marked exhibits 'A' and 'B', which are to be considered a part hereof; *that defendants, Wm. Fraser and G. H. Britton did not know nor deal with any of the plaintiffs except P. M. Barton and the Three-Way Land Company, who assumed to be the owners, did offer to sell or consign, and did deliver said cotton to the defendants, Wm. Fraser and G. H. Britton.*" R. p. 106 Par. II.

In the original complaint, in the case entitled P. M. Barton et al. vs. United States of America, the record shows this suit was filed only against G. H. Britton Cotton Company, and Fraser and Britton, and was filed only by P. M. Barton, as the plaintiff, and that P. M. Barton merely sued in behalf of the other so-called plaintiffs, including the 62 sharecroppers. R. pp. 3, 9, 17.

This is also shown by the Findings of Fact, paragraph I, where it is recited that:

> "P. M. Barton, individually, and the other parties *in whose behalf* he institutes this suit———." R. p. 147.

There was, thus, only one plaintiff in this action, to-wit, P. M. Barton; and this is true, though he sues as an individual, and as a representative, in behalf of others.

The judgment of the court, however, does not fit the complaint, but makes its recovery against Britton and Fraser to run in favor of the severally named sharecroppers, and stockholders of a dissolved corporation, with none of whom Britton and Fraser had any contract whatever. R. pp. 161, 169, 106, Par. II.

Britton and Fraser bought from a solvent corporation, and are confronted with a suit in behalf of a host of individuals, mostly worthless sharecroppers, of whom they had never heard before. There was purpose in this distortion.

At least they had a right to look to the Solvent Agent, so called, Three-Way Land Company, with whom they contracted:

JURISDICTION OF THE DISTRICT COURT

Jurisdiction of the district court was based on diversity of citizenship, P. M. Barton, and those for whom he sued being non-residents of Tennessee, Fraser and Britton being residents of Tennessee. R. pp. 3 and 4.

JURISDICTION OF THIS COURT

Jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, 28. U.S.C.A. 347, (a) as amended.

SPECIFICATION OF ERRORS AND REASONS FOR GRANTING CERTIORARI

Your petitioners respectfully submit that the Circuit Court of Appeals was in error in the following respects:

I.

The Court erred in sustaining a judgment against Britton and Fraser in favor of numerous individuals who were not plaintiffs in the action, nor parties to the contracts, but were merly persons in whose behalf Barton had

sued; and in holding that Barton was the proper party plaintiff, and in not holding that the Three-Way Land Company, a corporation, was the only proper plaintiff. Authorities, supra. Op. R. p. 978.

This was error because:

1. Britton and Fraser purchased the cotton from the corporation, and knew no one else in the deal. R. p. 106, Par. II.

2. P. M. Barton had full authority as president, and as one of the liquidating agents of the corporation, to sell the cotton, and to sue on the contract of sale in the name of the corporation. R. p. 591.

3. He first sued in that way in the Missouri Court, but adopted other tactics in the instant case for obvious reasons.

4. The corporation, as plaintiff, would have, and should have, suffered an estoppel by reason of the fact that in Missouri it alleged the letter of April 24th was the contract, and that the corporation was the owner, whereas, the suit in Memphis alleged that the letter of April 2nd, was the contract, and a large number of share-croppers, the owners.

Johnson v. R. R. Co., 146 Tenn., 135 pp. 159 and 160, 240 SW. 429.

II.

The Court erred in not holding that the letter of April 24, 1942, and the succeeding letters ordering cotton, plainly and unequivocally meant that the buyers of the cotton,

G. H. Britton Cotton Company, were not to pay the Government tax, but would definitely pay $7 a bale above loan value, leaving the tax to be paid by the seller, and erred in permitting oral testimony to be used to contradict these writings which constituted the written terms of the definite contract of sale and purchase. Op. R. pp. 977-978.

This was error because:

1. The admission of the oral testimony permits a vital change in the written terms of the contract, in that the phrase "above loan value", is to be made to read, "above loan value plus the Government tax."

2. The basis of the reasoning of the learned court is that without this amendment the purchasers of the cotton would reap a profit of $46,000. This falls because if the amendment is made, and purchasers must bear the tax, $55,762.14, they deliberately traded themselves into a loss of $9,762.14.

3. It is more plausible that the Three-Way Land Co., the corporation had acquired the cotton by purchase, and had become aware of its own primary liability for the collection of the tax, as first purchaser, and was in a mood to get rid of the cotton on any terms.

III

The Court erred in holding that Fraser and Britton were liable, along with others, for the payment of the Government tax, or penalty. Op. R. p. 979.

This was error because:

1. The Court based this holding on the theory that

Fraser withheld the amount of the penalty from Barton and from the Government, and so, in effect, collected it. This theory does not hold because Fraser and Britton did not collect, nor intend to collect any tax, or money for such, but simply bought of a good and solvent seller cotton at a definite price, $7 a bale, assuming, naturally, that such a solvent seller had in acquiring the cotton made its own provisions about the satisfaction of any penalty and so stipulated in their letter of April 24th.

2. The holding is further based on the theory that Britton and Fraser bought non-quota cotton with notice. The facts are they simply bought cotton and had no notice they were to be in the role of first purchasers obligated under statutes to collect a tax for the Government.

3. In fact, the Three-Way Land Company, the seller corporation, was in the role of first purchaser from the growers and was, itself, solely, responsible for the collection and remission of the penalty, and probably had been derelict in this duty for many months. It had always, theretofore, sold cotton and paid the penalties. R. pp. 612-614 and 671.

4. No obligation rests upon a second, or other subsequent purchaser to see to it that a Government tax has been paid, or collected, or remitted. The penalty does not follow the transactions in cotton after it gets on the market, nor beyond the first purchaser.

5. May we not see here purpose and design on the part of this seller corporation, when we note that in Missouri it sued in its own name and on the basis of the letter of April 24, while in Memphis, in the instant suit, it not only changes the basis of suit to a letter of April 2,

but also remains in the background as party plaintiff, and has suit brought in behalf of a host of sharecroppers? This was to hide the fact of the corporation being the first purchaser.

6. If this corporation be not the owner as it first averred and as apparently it is, it held itself out as such, and Fraser and Britton are entitled to look to it for protection and performance as the agent of an undisclosed principal.

Metcalf v. Williams, 104 U. S. 93, 26 L. Ed. p. 665;
Echols & Co. v. Strachan Shipping Co., 21 Fed. (2d) 653, 654;
Riley v. Bondi (8th C.C.A.) 64 Fed. (2d) 515;
Pickands, Mather & Co. v. Kuhn & Co., (6th C.C.A.) 8 Fed. (2d) 704.

IV

The Court erred in refusing to give effect to the Tennessee Statute which provides:

> "Neither husband nor wife shall testify as to any matter that occurred between them by virtue of or in consequence of the marital relation." Tenn. Code 9777.

In that, the Court failed to exclude all testimony extracted from Fraser, and from his wife, about the funds, and failed to order the return of the funds taken from the person of Mrs. Fraser, and failed to sustain the errors assigned on the action of the trial court in overruling motion for exclusion of testimony and return of funds.

As to taking of funds, R. pp. 370-423.
Motion for return, R. pp. 114, 121.

Overruled by trial court, R. pp. 531, 535.
Errors assigned, R. pp. 179, 181.

This was error because:

1. The Court in its opinion held, that, while the law extended to both utterances and acts between husband and wife in Tennessee, in some jurisdictions, outside of Tennessee, there were decisions that the rule of exclusion did not apply where the husband was acting in furtherance of a fraud; and the court, while stating that there was no Tennessee decision to this effect, believed that public policy warranted such an exception in Tennessee when communications and acts of the husband were in furtherance of a fraud, particularly when Government revenue was involved. R. pp. 983, 984.

This view is erroneous because, the Tennessee statute and Tennessee decisions are plain and specific and warrant no such exception as has been engrafted thereon in the above view.

Government revenue is not sacrosanct, but if and when its collection needs special arrangements federal statutes provide such and it does not remain for federal courts to amend state statutes by construction to give the government a special advantage.

The aura of fraud about this record is wholly synthetic and a work of art. G. H. Britton Cotton Company, and its two partners, Britton and Fraser, simply stood stock still when Barton turned loose his guns of litigation, first in Missouri and then in Memphis, and held the funds (R. p. 335). This is not fraud, nor does it even suggest fraud.

Testimony of G. H. Britton:

"Q. What was your purpose in turning this money over to Mr. Fraser—this $29,500?

A. I understood that Mr. Fraser was to hold that money until the outcome of the suit with Mr. Barton, or until some definite settlement was made." R. 437.

2. The Court in its opinion does cite a Tennessee case holding that a wife, while unable to testify to receipt from the husband, was permitted to avow her possession of the article, a deed. R. p. 983.

But a deed may bear intrinsic evidence of its source and significance, but this is not true of money. So, if the Court has taken money from Mrs. Fraser, and is barred from knowing where that money came from, then the court would be put in the brutal act of taking money from a person without knowing why, or whose it was.

3. Then the learned court takes the view that it is not restricted by the rule of Erie R. R. vs. Tomkins, 304 U. S., 64, because the matter involved was one of remedial procedure under the equity powers of the court. R. p. 984.

No. The procedure was specifically under Federal Rule of Civil Procedure, No. 26, which rule itself expressly excepts matters that are privileged. On questions of privileged communications federal courts follow the law of the state of forum. Munzer vs. Swedish Am. Lines, (D. C. N.Y.,) 1940, 35 Fed. Suppl. 493; Wolfle v. U. S., 291 U. S. 7, 14, 78 L. Ed. 617, 620.

4. The Court then holds that Fraser, the communicat-

ing spouse, waived his rights to the protection of the rule, in that he did not stand his ground, refuse to answer, become contumacious, and seek relief from punishment for contempt by appeal or habeas corpus. R. pp. 984-985.

This view rather astounds us. We feel that it should be passed on by the highest court in the land, before it is accepted. Must a litigant deliberately get into contempt of a court in order to gain his rights, or protect his rights? Contempt of court is bad. It is not distressing—not when it is infrequent, as it now happens to be. But if the day ever should come when contempt of court should be prevalent and widespread, then we may fear for the very foundations of our society. We submit it is sheer folly to invite the practice of contemning the courts, or to prescribe it as a condition for the protection of rights in court.

The proper practice being submission and appeal from Adverse Rulings:

Crane vs. Hall, 141 Tenn., 563, 213 S.W., 414;
Cavert vs. State, 158 Tenn., pp. 542 and 543, 14 S.W. (2nd) 735;
Wolfle vs. U.S., 291 U.S. 7, 14, 78 L. Ed. 617, 620;
New York Life Ins. Co. vs. Ross (6th C.C.A.) 30 Fed. (2nd) 80, 89.

5. The Court then takes the final view that, even though there was error in requiring the disclosure, yet the disclosure once made is irrevocable, and is public property and may not be recalled; that this disclosure reveals that Fraser got the avails of the cotton, gave same to his wife to conceal; that it would be inequitable to return these funds, as they would be further concealed; and

the court compares the funds to seized liquors, and points out that while the search and seizure of the liquors might have been unlawful, all that is to be done is to exclude the testimony, but not return the seized liquors. Thus the learned court would keep the funds, despite the error. R. pp. 985-986.

Such a view is cold comfort to a citizen suffering a violated right. Its doctrine is—violate rights and you may keep what you find.

Seized liquors are not like monies. Liquors possessed by a person bear intrinsic evidence of illegality. Not so, with monies, about the possession of which there is nothing illegal. The learned court seems unable to do what juries are often called on to do, that is, forget and not use, testimony which has been excluded as incompetent. If courts expect juries to do that, certainly the courts should practice what they prescribe. If the learned court had simply laid aside from its thinking all the knowledge it had gained from the illegally admitted evidence about the monies, then it would have found itself in possession of monies which had been taken off a person without knowledge as to where the funds came from, or whose they were—in which situation nothing short of the return of the funds to the person from whom they were taken can relieve the court from the role of a bully. A court of equity must do equity, and it cannot be inequitable to reconstruct for parties their invaded rights, and restore a status quo, whatever the chagrin.

REASONS RELIED ON FOR REQUESTING WRIT

We feel that we have stated ample reasons along with

the errors specified, and do not desire to lengthen this Petition, but believe that this case involves some important questions of law, among these being:

1. The application of the rule in Erie Railroad Co. vs. Tomkins, 304 U. S., 64, 82 L. Ed., 1188, 1194.

2. The application of the Tennessee privilege statute so as to give it real effect, in conformity with the previous holdings of this Court.

3. Recognition of generally established rules of evidence and law, as to the variation or nullification of written contracts by parole testimony, and the merger of preliminary negotiations into such agreements.

4. Application of the general law that a party to a contract with an agent for an undisclosed principal (if the sharecroppers be principals at all) is entitled to hold the solvent agent, in this case The Three-Way Land Company.

5. The application of the doctrine of estoppel so as to prevent the practice of playing fast and loose with the Courts, by changing both bases of suit and parties, for patent improper advantages.

6. The right of citizens to make private contracts with reference to the payment of penalties or obligations imposed by statute, particularly where those assuming the burden are amply able to protect and hold harmless.

7. Recognition of the prohibition by Amendment Four to the Constitution of the abuse of the process of search and seizure.

8. And the application of the doctrine that information illegally or improperly obtained cannot be used.

9. That the ordinary processes of law cannot be cast aside merely for the sake of the adoption of unusual or extraordinary methods.

10. That the Congress has not enacted any attachment, garnishment, discovery or execution laws, but that the Federal Courts are dependent on State Statutes, for these processes.

28 U. S. C. A., Sec. 726, 727.

11. The principle of discovery, for the purpose of seizure or confiscation is only applicable after exhaustion of ordinary final process, execution, etc.

PRAYER FOR THE WRIT

WHEREFORE, your petitioners pray that a writ of certiorari issue out of and under the seal of this Court to the Honorable Circuit Court of Appeals, requiring said court to certify and file in this Court on a day certain, to be designated, a certified transcript of the consolidated cases there entitled, William Fraser vs. United States; Mrs. William Fraser vs. United States: and P. M. Barton et al. vs. United States, Nos. 9639, 9640 and 9641, to the end that said consolidated causes may be reviewed and determined by this Court, and that petitioners may have such relief as this Court may deem proper and just, and that the opinion and judgment of the said Circuit Court of Appeals and the District Court may be reversed and corrected, and all proper relief granted.

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BRIEF AND ARGUMENT

Opinion and Findings of Facts of Lower Courts

We most respectfully submit that the actual premises of the Opinion of the Honorable Court of Appeals, as well as the Findings of Facts of the District Court, is erroneous in many respects, which we believe led to its improper disposition of the cause.

We, therefore, beg leave to point out a number of these, taking them in order:

> 1. " * * * the Three-Way Land Company * * * in 1941, leased some 15,000 acres, planted to cotton, on a sharecropper basis." R. p. 977.

Mr. Barton, himself, President of the Three-Way Land Company, says this Company owned—not leased—about this quantity of cotton lands. R. pp. 555 and 616. In the dissolution or division of its assets, he received better than 4,000 acres as his one-third share. R. p. 676. The Company produced over 30,000 bales of cotton in 1941.

Moreover, the very fact that it had on hand over 3,000 bales of snap cotton, which is the lowest grade of cotton known to the trade, always the last gathered, (R. p. 731), further establishes the acreage to have been substantially in excess of 30,000 acres. To have ten per cent snaps is about average. These facts alone make it evident that the Company was also leasing or renting at least 15,000 acres more, for, a bale to the acre is an unusually large production of cotton. Mr. Fraser estimates the acreage planted as being near 50,000 acres. R. p. 372.

This, in all probability is more nearly correct, as the annual Government Crop Reports show for the cotton belt an average of less than one-half bale per acre.

Besides, this Company owned gins, live stock, farming equipment and other extensive assets, of all of which Mr. Barton was in control and general manager. R. pp. 554 and 555. He was a thoroughly experienced cotton dealer and buyer himself. R. p. 554.

These accomplishments make it certain that he was fully conversant in business affairs, particularly in the field or business in which he was dealing with Fraser, or the Britton Cotton Company, and amply able to take care of himself. There is nothing in this record to indicate any fraud or overreaching on the part of Fraser. None is charged in the pleadings. R. pp. 1-19.

> 2. "* * * There was evidence that Fraser proposed to sell the cotton at a price sufficient to enable him to pay Barton 15 1/2 cents a pound, or an average of $7 a bale 'above loan values', and that Barton understood this to mean that it would be net to him after payment of all Government claims. This understanding was confirmed in later letters between the parties * * *." R. pp. 977 and 978.

We again humbly urge there are no such letters. The only letters referring to the price to be paid are the confirmations enumerated in the Petition for Certiorari, page 8, supra.

In fact, there is but one communication using this figure—15 1/2 cents per pound—this being the one of April 2nd, (R. pp. 569 and 570), at which time Fraser had never seen a sample of the cotton. R. pp. 330 and 333. On re-

ceipt of the first of these (R. pp. 329 and 730), Fraser, or the Britton Cotton Company, promptly advised:

> "We cannot tell about what the cotton will bring at this stage of our work." R. p. 574.

The first offer to buy the cotton was at a stipulated price of "$7 per bale above loan value." R. p. 481.

In this letter, it was expressly provided, after oral agreement to the same effect (R. pp. 330 and 331):

"We are not interested in any Government tax." Which could only mean—"you are to take care of this, or this is your obligation." It could have had no other meaning.

But, if extrinsic proof is to be considered, this is conclusive to the same effect, for, both Mr. Fraser and Mr. Shaw, the latter a wholly disinterested witness, say this phrase was thoroughly defined to Mr. Barton to mean the "actual loan outstanding against the cotton, and his Company was to pay the penalty." R. pp. 330, 331, 485, 486, 735 and 705-707.

To this Mr. Barton first agrees, then says he does not know its purport. R. pp. 671-675. But, he delivered the cotton on these letters. R. p. 675.

This leaves all three, the written contract—the letter—Fraser and Shaw, uncontradicted as to the literal agreement.

So, there was neither evidence that Fraser *proposed* to sell the cotton at a price " * * * of 15 1/2 cents a pound or $7 a bale 'above loan values' * * * after pay-

ment of all Government claims." Nor was "this understanding confirmed in later letters between the parties."

In reality, exactly opposites are the facts.

> 3. "Fraser's interpretation of the agreement would have enabled him to make a profit of $46,000, while Barton and the farmers received less than $20,000. * * *." R. p. 978.

It is difficult to ascertain the bases of the Court's calculations here.

But, may we demonstrate the converse by accurate figures, that is, what Fraser, or the Cotton Company, would have lost on the bases set up,—"$7 a bale 'above loan values' * * * net * * * after payment of all Government claims".

It is stipulated that 1,833 bales of this cotton was subject to the penalty, these weighed 796,602 pounds, which gives an average weight of 434 pounds per bale; further, that there was outstanding on this 1,833 bales, a loan of $64,140.18, which equals $35.00 per bale, or 8.06 cents per pound. R. pp. 107 and 108.

The penalty is 7 cents per pound. So, these two items total 15.06 cents per pound.

To this must be added 25 cents per bale for taking it out of the loan (R. p. 488); also sampling of 28 cents per bale (R. p. 504); 90 cents per bale storage (15 cents per month); $1.00 per bale brokerage for selling and $7.00 per bale to the Three-Way Land Company for its equity, or a total of $9.43 per bale, to say nothing of Fraser or Britton Cotton Company's operating expenses,

that is, traveling expenses, telephone calls, telegrams, office overhead—bookkeepers, stenographers, rents, etc.—and they ought to be entitled to living expenses while they handle it, requiring a maximum of another $1.00 per bale—or a grand total of $10.43 per bale.

This divided by the weight, 434 pounds, gives 2.4 cents per pound additional, or a final total of 17.46 cents per pound, necessary to pay what the Lower Courts say the contract was.

Now, the record does not disclose what Fraser and Britton got for the Barton cotton, but it does show what a similar cotton brought, that is, the Leftwich or Ellis Edwards cotton. R. p. 290.

Hence, if we determine the average price of this cotton, we will have, at least substantially, the price at which the Barton cotton was sold.

The weight of 139 b/c bringing $7,366.47, at 12.25 equals 60,134 pounds. R. p. 284.

The weight of 131 b/c bringing $8,927.75, at 14.10 equals 63,317 pounds. R. pp. 281, 228 and 290.

The weight of 15 b/c bringing $1,076.31, at 15.25 equals 7,057 pounds. R. p. 287.

The weight of 4 b/c bringing $220.54 at 13.35 equals 1,652 pounds. R. p. 282.

The weight of 2 b/c bringing $110.26 at 14.65 equals 752 pounds. R. p. 282.

These last two items cover the six bales which brought $330.80. R. p. 282.

Therefore, we have the total weight of 132,972 pounds

for the 291 bales sold through Leftwich for $17,701.33, which gives us an average price of 13.32 cents per pound.

Hence, the difference between this price and the one set up by the Court of 17.46 cents per pound equals 4.14 cents per pound loss to Fraser or the Britton Cotton Company. On this basis, 796,602 pounds, the amount subject to penalty, that its, 1,833 bales, gives an actual loss, not counting any profit or pay for handling, of $32,975.32, resulting to Fraser or the Cotton Company on the basis fixed by the Lower Courts.

So, either dilema of the horn we take, it looks like, at least, one of these thoroughly experienced businessmen, Barton or Fraser, made a foolish contract.

Now, if the Court is going to permit a departure from the contract reduced to writing, accepted and performed by the parties, themselves, then we urge that the loss equitably belongs on Barton, or his disclosed principal, the Three-Way Land Company, for the reason that this incongruity results solely as a consequence of his over optomistism as to winning the suit, contesting the constitutionality of the Act, then being maintained by him and approximately 150 other farmers (R. pp. 614 and 615) in the United States District Court at Cape Girardeau, Missouri. Mr. Fraser says that Mr. Barton was confident of winning this suit, when he sold the cotton and this was one of the reasons why Barton or the Three-Way Land Company, for whom he was acting, assumed and agreed to pay the tax or penalty thereon. R. p. 483.

This gives a sensible and logical reason for the actions of the parties in making what may appear to be, on its face, an unusual contract.

Therefore, the Three-Way Land Company should be required to take the loss resulting from its own mistake, and it is patently wrong to visit this upon Fraser, as the Lower Courts have done.

That the Three-Way Land Company was to assume and pay this tax is made certain by other undisputed facts.

Mr. Barton, himself, says that he had sold, theretofore, from year to year, thousands of bales of cotton which was subject to penalty but which was never deducted from his sales by any cotton buyer, but these were all paid by him, or his company, in every instance. R. pp. 612-614 and 671.

These two facts make the trade sensible on the part of both parties, and is in conformity with the long established practice of the Three-Way Land Company, and confirms the oral and written contract (the letter of April 24th, excluding the penalty or tax), to the effect that Fraser or the Cotton Company was not to be responsible for the tax.

> 4. "The Corporation has surrendered its charter and given Barton the authority to liquidate and wind up its affairs." R. p. 978.

The resolution dissolving the Corporation expressly provides that *all* the officers of the Corporation shall perform this service, and not Barton alone (R. p. 591), as held by the lower courts.

Of course, the officers and stockholders, P. M. Barton, H. Highfill, R. L. and W. L. Taylor, upon dissolu-

tion and receipt of the corporate assets (R. p. 616) became actual parties to its contracts and obligations.

Parties to a contract are always necessary to the cause.

Nashville & D. R. Co., vs. Orr, 85 U. S., 471, 21 L. Ed., 810;
Payne vs. Hook, 74 U. S., 425, 19 L. Ed., 260;

An application to make them parties was refused. R. pp. 122, 123, 521, 529 and 530.

Therefore, the judgment rendered against them herein is absolutely void.

5. Estoppel—The Missouri suit in the name of Three Way Land Company, is based on the letter of April 24th, while the suit here is rested on letter of April 2nd. The District Court found reference to the April 24th letter in Missouri suit was error in drafting—the Court of Appeals says the "evidence to support this finding is meager", but sanctioned this apparent error, because "there being no showing of willful misstatement, and none of prejudice there is no estoppel." R. p. 978.

The reason for this "sanction" is clearly erroneous. For, the contract was made solely with the Three-Way Land Company, (R. p. 106, Par. II) a thoroughly solvent and enormously wealthy corporation, which was amply able to perform its contract and hold Fraser and the Cotton Company harmless, he (Frazer) is now held jointly and severally liable with sixty-two sharecroppers who are worthless, and whom it is now held were the undisclosed principles in the contract. R. pp. 161, 169. This is certainly prejudicial.

The Corporation willfully misstates the facts when it alleged it was the owner of the cotton in that cause.

AGENT BOUND WHERE PRINCIPAL UNDISCLOSED

Fraser and the Cotton Company are entitled to litigate their rights and hold this corporation solely and personally responsible, because of its failure to disclose its principal, for whom it was acting as agent.

Metcalf vs Williams, 104 U. S., 93, 26 L. Ed., p. 665;

Echols & Co. vs. Strachen Shipping Company, 21 Fed. (2d) 653, 654;
Riley vs. Bondi, (8th C.C.A.) 64 Fed. (2d), 515.

Hence, the original Plaintiffs in this cause are estopped to maintain this suit on a different contract or basis to that alleged, and with different parties to those in the Missouri cause.

Johnson vs. R.R. Co., 146 Tenn., 135, (pp. 159 and 160) 240 SW. 429.

RIGHT OF PRIVATE CONTRACT FOR RELEASE FROM PENALTIES

6. "The Court held both parties liable and we agree. Fraser withheld both from Barton and United States the amount of penalty and, so in effect, collected it." R. p. 979.

This is based on the fact that neither Barton, or the Three-Way Land Company, nor Fraser, or the Cotton Company, reported the transactions in cotton subject to penalty. R. p. 979. Frazer has from the beginning

admitted that he and the Cotton Company were secondarily liable. R. pp. 65, 354 and 355.

But, has insisted and now insists, that he is entitled to have the Government exhaust its remedies against the Three-Way Land Company, before demanding the penalty of him, supra. The law permits parties to contract with reference to responsibility imposed by Statutes:

> "There can be no valid agreement to violate a law, *but private, legal obligations, imposed by statute, may be varied by agreement which is not forbidden by law*, or which is not in violation of the spirit of the law."
>
> Westinghouse El. & Mfg. Co. vs Binghamton R. R. Co., 255 Fed., 378, Headnote 9.

And it is the duty of the Government, as Intervenor, to recognize this contract, instead of trying to destroy it, as is very evident in this record.

> "*If one person agrees with another to be primarily liable for a debt, due from that other to a third person, so that as between the parties to the agreement, the first is the principal, and the second the surety*, the creditor of such surety is entitled in equity to be substituted in his place *for the purpose of compelling such principal to pay the debt.*"
>
> Keller vs Ashford, 133 U. S., 610, 623, 33 L. Ed., 667;
> Fish vs. First Natl. Bank, 150 Fed., 524.

VIOLATION OF CONFIDENTIAL COMMUNICATIONS BETWEEN HUSBAND AND WIFE.

Every effort was made to protect this right. R. pp. 373, 379, 382, 384, 385, 387, 388, 396 and 403.

This immunity is recognized by both State and Federal Courts.

Section 9777, 1932 Tennessee Code;
Calvert vs. State, 158 Tenn., pp. 542, 543;
Wolfle vs. U. S., supra.

Likewise, it is confidently urged that the manner and means used to obtain and take away from the Petitioners the funds and bonds in question was in open violation of the provisions of Amendment Four to the Constitution, and should be returned.

Weeks vs. U. S., 323 U.S., 383, 58 L. Ed., 652;
U. S. vs. Mattingly, 285 Fed., 922;
U. S. vs. Madden, 297 Fed., 679;
U. S. vs. Lydecker, 275 Fed., 976.

Neither can information thus improperly obtained be used.

Byars vs U. S., 273 U. S., 28, 71 L. Ed., 520;
U. S. vs Slusser, 270 Fed., 818;
U. S. vs. Bush, 269 Fed., 455;
U. S. vs. Costanzo, 13 Fed. (2d) 259.

NO RIGHT TO SUBSTITUTE EXTRAORDINARY FOR REGULAR PROCESS.

Nor can the use of the ordinary processes of law be avoided, or circumvented, by the regular or mandatory orders of the Court.

Weinberg vs. U. S., 126 Fed. (2d) 1004.

FEDERAL COURTS ARE DEPENDENT ON STATE LAWS FOR ATTACHMENT, ETC.

Congress has enacted no attachment, garnishment, discovery or execution laws. But, Respondents are wholly dependent on State Statutes for these processes.

28 U.S.C.A., Sec. 726, 727.

RIGHT OF DISCOVERY

As to discovery, the laws of Tennessee are that a creditor is only entitled to this against the debtor, himself, after judgment and execution.

1932 Tennessee Code, Sec. 10353.
Cresswell vs Smith, 76 Tenn., 688;
Jourolman vs. Massengill, 86 Tenn., 81, 5 S.W., 719;
Adler, et al. vs. Fenton, et al, 65 U.S. 407, 16 L. Ed. 696.

It is, therefore, respectfully submitted that the Petition for Certiorari in this cause should be granted in order that justice may be done.

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Of Counsel.

JAN 15 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

—o—

No. 805

—o—

WILLIAM FRASER, ET UX., Petitioners

VS.

P. M. BARTON, ET AL., Respondents

—o—

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, STATEMENT OF THE CASE, BRIEF AND ARGUMENT ON BEHALF OF RESPONDENTS, P. M. BARTON, ET AL.

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THE DAILY NEWS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

—o—

No.

—o—

WILLIAM FRASER, ET UX, Petitioners

VS.

P. M. BARTON, ET AL., Respondents

—o—

STATEMENT OF THE MATTER INVOLVED

Respondents Barton and associates will be referred to as respondents and petitioner Fraser as petitioner, since the primary controversy as to respondents Barton and associates is with Fraser alone on this application for certiorari.

P. M. Barton, on behalf of himself, his associates, and a number of their tenants instituted the above action against the respondents Fraser and his associate Britton for the purpose of obtaining an accounting with respect to the sale of certain cotton which was marketed in the spring and early summer of 1942. Respondents sought a

money judgment in the amount of the net proceeds of the sale of what they believed at that time to constitute 1859 bales of low grade cotton, and also sought an accounting. (Tr. pp. 3-9).

On the 23rd day of March, 1942, they contend that an oral agreement was had between P. M. Barton et al on the part of respondents and Wm. Fraser of the G. H. Britton Cotton Co., and the other appellee, Britton, whereby it was agreed that G. H. Britton Cotton Co., through their representative or agent, William Fraser, would attempt to sell approximately 3000 bales of low grade cotton. On the 2nd day of April, 1942, confirming this agreement, G. H. Britton Cotton Co., addressed the following letter to P. M. Barton, Three Way Land Co., Catron, Missouri, to-wit:—

"

G. H. BRITTON COTTON CO.
48 So. Front Street,
Memphis, Tenn.
4-2-42.

Mr. P. M. Barton,
3 Way Land Co.,
Catron, Mo.

Dear Mr. Barton:

Confirming our conversation of the 23rd. We are to sell your snap cotton at a price of 15½c per lb. (This does not include your son's cotton). We have until May 10th inclusive to do this unless the Govt. takes over the cotton.

I don't think, Mr. Barton, that the information we had yesterday with reference to the Govt. is authentic, however, I will keep posted so we could act on the equities if necessary.

My understanding is that you would prefer selling the equities at a price of $7.00 per bale above loan values, this I will keep in mind and submit anything we run across.

Hope Mr. David Barton sees fit to let us have his cotton.

Certainly I am going to do my level best for anyone I represent and I do appreciate your cooperation.

Referring to your question about SLIM dull cotton. There is practically no demand, but I am sure it is worth 18¼c.

I have located 2 mills who are changing their manufacture to the lower grades. I will see them Monday.

Thanking you and with best wishes.

Sincerely yours,

G. H. BRITTON COTTON CO.
By Wm. Fraser."

(Tr. pp. 3-5, 569, 570)

By the terms of this letter P. M. Barton, his associates and their tenants understood that the cotton would either be sold for not less than 15½c per pound or their equities in the cotton would be sold to average not less than $7.00 per bale net to them. (Tr. pp. 576-578, 563-565)

On April 6, 1942, P. M. Barton for the Three Way Land Co., addressed the following letter to G. H. Britton Cotton Co., to-wit:

"THREE WAY LAND COMPANY,
April 6, 1942.

G. H. Britton Cotton Company
48 South Front Street,
Memphis, Tennessee.

Gentlemen:

With reference to the 3,000 bales of snapped cotton that we put in the loan through the Midsouth, I will be in Memphis one day this week and will go over the proposition with you. I do not think it is a good idea for us to move the samples from the Midsouth without going over the matter with them personally, as they put the cotton in the loan for us and we feel as if we should give them a change to handle it for us.

We probably will be able to work it out when I get in Memphis, even if we have to resample the cotton and give you samples on it.

So, just let it ride until later in the week, when I will be in Memphis.

Very truly yours,

P. M. BARTON,

PMB/nis President, Three Way Land Company."

(Tr. pp. 571-572)

In no wise contradicting but supplementing the contract embodied in the letter of April 2, 1942, a verbal understanding was reached with reference to the escrowing of the penalties. By this verbal understanding it was

agreed that if the cotton was sold by the pound, to-wit, 15½c per pound, the amount of penalty due the Government by reason of the fact that the cotton was produced on land in excess of the Government allotment would be placed by Fraser & Britton in an escrow agreement and that they would see to it that a receipt would be mailed by the escrow agent, the treasurer of the County Committee, to respondents. If the equity in the cotton was sold the $7.00 per bale for respondents' equity would be mailed to them at once and at the same time petitioner would pay certain loans to the Mid-South Cotton Growers Association outstanding against said cotton and would also escrow the Government penalty. None of this testimony was objected to and is now a part of the record and properly so since it was not contradictory to any provision of the written contract of April 2, 1942, but merely supplementary thereto.

(Tr. pp. 576-580, 563-565)

On April 20, 1942, G. H. Britton Cotton Co., by Wm. Fraser, addressed the following letter to P. M. Barton, Three Way Land Company, Catron, Mo., to-wit:

"4-20-42

Mr. P. M. Barton
3 Way Land Co.,
Catron, Mo.

Dear Mr. Barton:

We have received the samples of 300 bales your snaps. We believe that we can sell this cotton however we cannot tell about what the cotton will bring at this stage of our work, but know the price will be satisfactory.

• • • • •

Yours truly,

G. H. BRITTON COTTON CO.,
By Wm. Fraser."
(Tr. pp. 574-575)

On April 24, 1942, G. H. Britton Cotton Co., addressed to P. M. Barton, Three Way Land Co., Catron, Mo., the following letter, to-wit:

"

G. H. BRITTON COTTON CO.
Memphis, Tenn.
4-24-42

Mr. P. M. Barton, 3 Way Land Co., Catron, Mo.

Dear Mr. Barton:

This will confirm option given us today on 3000 bales your snap cotton at $7.00 per bale above loan value, good until Tuesday April 28. With the privilege of taking 1000 bales and/or 2000 bales and/or 3000 bales.

The cotton to be billed to us at loan value. The $7.00 per bale is to be paid to yourselves.

We are not interested in any Government tax.

I hope we can get the trade thru.

Thanking you, we are

Yours very truly,

G. H. Britton Cotton Co.

By Wm. Fraser."
(Tr. pp. 575-576)

On receipt of this letter P. M. Barton talked with Wm. Fraser either in Memphis or by long distance, in which conference P. M. Barton requested Wm. Fraser to clarify his letter of the 24th and explain what he meant by the words "We are not interested in any Government tax". In answer to this question Mr. Fraser assured plaintiff, P. M. Barton, that that was a correct statement of the situation, that they were not interested in the tax nor was P. M. Barton or his associates and tenants interested in the tax. Mr. Fraser stated that what he had done was that he had simply sold the equity in the cotton, that his understanding of the letter of April 2, 1942, concerning the sale of the cotton was that Barton and his associates would prefer to sell their equity and have the buyer pay the loans due the Mid-South Cotton Growers Association and the Government penalty. (Tr. pp. 576-577)

On April 27, 1942, the following letter was written by the G. H. Britton Cotton Co., of Memphis, Tenn., and was addressed to P. M. Barton, Three Way Land Co., Catron, Mo., to-wit:

"

G. H. BRITTON COTTON CO.
Memphis, Tenn.
4-27-42

Mr. P. M. Barton
3 Way Land Co.,
Catron, Mo.

Dear Mr. Barton:

As per telephone conversation this afternoon.
We confirm sale of 1000 bales your snap cotton at $7.00 per bale above loan value, as per option given to us April 24, 1942.

• • • • •

Yours very truly,
G. H. Britton Cotton Co.
Wm. Fraser". (Tr. pp. 578-579)

P. M. Barton, upon receipt of this letter discussed the matter again with Wm. Fraser and told him that the letters were not clear, that the letter of April 27, confirming the sale of 1000 bales of cotton mentioned their letter of April 24th. P. M. Barton was further assured by Wm. Fraser that in the future he would either state "for your equity" or "net to you". (Tr. pp. 579-580)

P. M. Barton on May 5, 1942, received a telegram addressed to "P. M. Baron care Heifel Cotton Co.", which telegram was delivered to him at Blytheville, Arkansas, and was signed "B. H. Britton Cotton Co. Fraser". P. M. Barton assumed that this telegram was intended for him and that the "B. H. Britton Cotton Co." was intended to be G. H. Britton Cotton Co. Said telegram is in words, and figures as follows:

"P. M. Baron 1942 May 5 AM 11 56
Care Heifel Cotton Co VK

We confirm two hundred bales your cotton at 8.00 *net* per bale for equity. Haven't heard from big lot as yet. Call me

B. H. Britton Cotton Co Fraser."
(Tr. p. 580)

This telegram stated definitely that the *net* for the equity of P. M. Barton, his associates and tenants was $8.00 per bale. Either the same day or one day later the G. H. Britton Cotton Co., addressed a letter to P. M. Barton, Catron, Mo., in words and figures as follows:

" G. H. BRITTON COTTON CO.
Memphis, Tenn.
5-5-42

Dear Mr. Barton:

As per telephone conversation today we confirm 400 bales your cotton @ $8.00 *net*, per bale above 1941 loan value.

Please acknowledge. Thanks.

Yours very truly,

G. H. Britton Cotton Co.

Wm. Fraser"

This letter confirmed the sale of 400 bales of cotton at $8.00 *net* per bale. (Tr. pp. 580-581)

On May 8, 1942, G. H. Britton Cotton Co. addressed a letter to P. M. Barton, Catron, Mo., in words and figures as follows:

" G. H. BRITTON COTTON CO.
Memphis, Tenn.
5-8-42

Mr. P. M. Barton
Catron, Mo.

Dear Mr. Barton:

As per telephone conversation we confirm purchase 100 bales snaps @ $7.00 per bale *net* to you.

Yours very truly,

G. H. Britton Cotton Co.

Wm. Fraser''

This letter contained among other things ''$7.00 per bale *net* to you''. (Tr. pp. 581-582)

On May 11, 1942 the G. H. Britton Cotton Co. addressed a letter to P. M. Barton, Catron, Mo., in words and figures as follows:

'' G. H. BRITTON COTTON CO.
Memphis, Tenn.
5-11-42

Mr. P. M. Barton
Catron, Mo.

Dear Mr. Barton:

We confirm sale 200 b/c @ $7.00 per bale above loan value *net* to you.

Yours very truly,

G. H. Britton Cotton Co.

By Wm. Fraser''

This letter confirmed a sale of 200 bales of cotton at ''$7.00 per bale above loan value *net* to you.'' (Tr. p. 582)

On May 15, 1942, the G. H. Britton Cotton Co. addressed a letter to P. M. Barton, Catron, Mo., in words and figures as follows:

" G. H. BRITTON COTTON CO.
Memphis, Tenn.
5-15-42

Mr. P. M. Barton
Catron, Mo.

Dear Mr. Barton:

We confirm purchase as follows:

100 b/c @ $7.00 *net* above loan value.

125 b/c @ $6.00 above loan value.

Will have more we hope Monday.

Yours truly,

G. H. Britton Cotton Company"

This letter contained among other things the statement "100 bales of cotton at $7.00 *net* above loan value" and "125 bales of cotton at $6.00 above loan value".

(Tr. pp. 582-583)

These letters set forth the written evidence of the chronological order of events insofar as the sale of the cotton in question was made to petitioner Fraser and Britton.

The cotton involved amounted to 1853 bales of which 1833 was "red card" or penalty cotton. Fraser and Britton sold the cotton for some $123,111.95. From the proceeds they discharged a loan thereon of $64,140.18, held by the Mid-South Cotton Growers Association. (Tr. pp. 107, 108, 155). They did not pay the penalty of $55,762.14 or any part thereof nor did they remit to respondents the sum of $12,971.00. They also refused to account to respondents in any manner. (Tr. pp. 155-156).

Suit for an accounting was first brought in Missouri on May 22, 1942, in the name of the Three-Way Land Company, then a corporation, but was withdrawn for defective service. (Tr. pp. 148, 587). This corporation was dissolved on July 27, 1942, pursuant to resolution of February 2, 1942. (Tr. pp. 573-4, 592-3). All assets were divided between P. M. Barton, R. L. Taylor and H. Highfill and the cotton in question was owned one-fourth by them jointly and the remaining three-fourths by the tenants. (Tr. pp. 106, 148). The present action was brought by P. M. Barton for all interested parties and by express authorization from them. (Tr. 589-91).

Petitioner Fraser in his answer denied practically all allegations of the complaint and particularly that he or the Britton firm had agreed to pay the penalties, but contended respondents had agreed to do so. (Tr. pp. 70-74). He also plead estoppel for them to claim ownership of the cotton in this action and ownership in the Three Way Land Company in the Missouri suit and estoppel by reason of the Missouri action being predicated on an alleged letter of April 24, 1942, and the present one on a letter of April 2, 1942. (Tr. pp. 69, 589). For further defense and by way of cross-claim he contended for damages by reason of the refusal of respondents to deliver all of the cotton originally contemplated. (Tr p. 75)

The United States of America filed an intervening complaint against all parties to recover the unpaid marketing penalties. (Tr. pp. 10-20).

During the trial Wm. Fraser and his wife were required to pay into court some $28,875.00 which she was concealing on her person. (Tr. p. 56). Britton voluntarily paid in $1875 (Tr. p. 58) in bonds and P. M. Barton sur-

rendered voluntarily an uncashed check for $2,711.00 which represented the only remittance he had received from the sales. (Tr. p. 60)

JUDGMENT OF THE DISTRICT COURT

The Court upheld the validity of the seven cent penalty and rendered judgment against both petitioner and respondents for the sum of $55,762.15 in favor of the Government. Proper credit was allowed for the some $33,461.00 paid into Court. Appellants were granted judgment against Fraser and Britton for $12,971.00 as the aggregate sale price of the equities at $7.00 per bale *net* to them as they had contended they were entitled to. The temporary injunction against appellees restraining them from disposing of any of the cotton or its proceeds was made permanent. All costs were assessed against Frazer and Britton. (Tr. pp. 161-169).

P. M. Barton et al. and William Fraser both perfected appeals from the adverse portions of the judgment, but no appeal was taken by Harris Britton.

JUDGMENT OF THE CIRCUIT COURT OF APPEALS

The Circuit Court of Appeals affirmed in toto the action of the trial court. (Tr. 975-6).

SUMMARY OF QUESTIONS INVOLVED AS TO THESE RESPONDENTS

I.

Whether their equities in the cotton herein involved were sold by P. M. Barton and his associates and co-plaintiffs to William Fraser and G. H. Britton, individually and doing business as G. H. Britton Cotton Company, under an agreement whereby they were to be paid therefor by said buyers $7.00 per bale net above all fixed charges against said cotton, including the loan to the Mid-South Cotton Growers Association and the marketing penalties.

II.

Whether Fraser and Britton are entitled to set-off, recoup or counter claim any damages from respondents for their failure to deliver the entire 2375 bales of cotton contracted to be sold to them; and whether their pleas and cross-complaints seeking to do so were properly overruled and disallowed.

III.

Are respondents estopped to prosecute the present action by reason of any alleged inconsistency between it and the action which they filed in Missouri?

Was the latter action properly brought in the name of The Three Way Land Company, which corporation was dissolved before the institution of the present action necessitating it being brought in the name of the individual plaintiffs? Likewise, was the letter of April 2, 1942, mentioned in the complaint in this cause and introduced in evidence the same as that alleged to be dated April 24,

1942, in the Missouri suit and through oversight, mistake and inadvertence of the draftsman incorrectly referred to in the Missouri action as of April 24, 1942, rather than April 2, 1943? Did any estoppel result therefrom? Fraser's petition challenges the ruling of the Courts in respondents' favor.

ARGUMENT

I. The Supreme Court Exercises Most Sparingly Its Power To Grant Certiorari

Writs of certiorari to review judgments of the Circuit Courts of Appeal are only granted under special circumstances.

> State of Ohio ex rel Seney v. Swift & Co., 43 S. Ct. 22, 260 U. S. 146, 67 L. Ed. 176.

"While this power is co-extensive with all possible necessities and sufficient to secure to this Court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised *****".

> Forsyth v. Hammond, 166 U. S. 506, 17 S. Ct. 665, 41 L. Ed. 1095.

"As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision."

> Lau Ou Bew, Petitioner, 141 U.S. 583, 587, 12 S. Ct. 43, 35 L. Ed. 868, 869;
>
> In re: Woods, 143 U. S. 202, 12 S. Ct. 417, 36 L. Ed. 125;

Lau Ou Bew. vs. U. S., 144 U. S. 47, 12 S. Ct., 517, 36 L. Ed. 340, 344;

Am. Constr. Co. vs. Jacksonville R. Co., 148 U. S. 372, 383, 13 S. Ct. 758, 37 L. Ed. 486, 491;

Fields vs. U. S., 205 U. S. 292, 296, 27 S. Ct., 543, 51 L. Ed. 807, 810;

Houston Oil Co. vs. Goodrich, 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385.

Ordinarily The Supreme Court Will Not Grant Certiorari To Review Concurrent Findings of Facts By The District Court and Circuit Court of Appeals.

It must be a strong case in which the Supreme Court will set aside concurrent findings of District Court and Circuit Court of Appeals regarding validity and infringement of a patent, Goodyear Tire & Rubber Co. v. Ray-O-Vac Co., (111, 1944), 64 S. Ct. 593, 321 U. S. 275, 88 L. Ed.

The Supreme Court would accept findings of District Court concurred in by Circuit Court of Appeals where no clear error was shown. Anderson v. Abbott, (Ky. 1944), 64 S. Ct. 531, 321 U. S. 349, 88 L. Ed.—, rehearing denied 64 S. Ct. 845, 88 L. Ed.

Findings made after hearing by District Judge on undisputed or conflicting evidence, not questioned by appellate court and not without substantial support in evidence, were accepted by the Supreme Court as unassailable. Alabama Power Co. v. Ickes, (1938), 58 S. Ct. 300, 302 U. S. 464, 82 L. Ed. 374.

Concurrent findings of fact of District Court and Circuit Court of Appeals which were not shown to be plain-

ly erroneous or unsupported by evidence were accepted by Supreme Court as conclusive basis for its decision. Virginian Ry. Co. v. System Federation No. 40 (Va. 1937) 57 S. Ct. 592, 300 U. S. 515, 81 L. Ed., 789.

On a question of fact the Supreme Court will accept the consurrent findings of the District Court and Circuit Court of Appeals supported by substantial evidence. The Linseed King (N. Y. 1932) 52 S. Ct. 450, 285 U. S. 502, 76 L. Ed. 903.

The Supreme Court accepts findings in which two courts concur, unless clear error is shown. Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks (Tex. 1930) 50 S. Ct. 427, 281 U. S. 548, 74 L. Ed. 1034.

JUDICIAL ESTOPPEL NOT APPLICABLE

There are several reasons why the doctrine of judicial estoppel is not applicable to the case at bar:

(a) The Statement Must Be Under Oath.

In the first place the decisions in Tennessee seem to require that the statement be made under oath in a former judicial proceeding. Perhaps the leading case on judicial estoppel in this State is that of *Sartain v. Dixie Coal & Iron Co.*, 150 Tenn. 633, and the language there used lays great stress on the statement being made under oath:

> "The term 'judicial estoppel' as used in our reports indicates particularly that class of estoppels arising from *sworn* statements made in the course of judicial proceedings, generally in a former liti-

gation, although in two of our cases the statement was made either in a pleading (Smith v. Fowler, 12 Lea 163) or in testimony (Johnston v. Ry. Co., 146 Tenn. 135, 240 SW 429), in the same case.

"In all the others, however, the basis of the estoppel claimed was a *sworn* statement made in a former proceeding. (Citing numerous cases).
(P. 647)

"It is, as already stated, based solely upon that public policy which upholds the sanctity of an *oath*, and precludes a party who has made a *sworn* statement—even in another litigation—from repudiating the same when he thinks it to his advantage to do so.

It might well be termed '*estoppel by oath*'."
(P. 650)

In point also is the language of Mr. Justice Beard in *McLemore v. Charleston R. R.*, 111 Tenn. 639: "The policy of the law will not permit anyone to gainsay what he has deliberately *sworn* to in the course of a judicial proceeding."

Pertinent in this regard is the following from *Hamilton v. Zimmerman*, 5 Sneed 48:

"And this doctrine applies with peculiar force, to admissions or statements made under the sanction of an *oath*, in the course of judicial proceedings. The chief security and safeguard for the purity and efficiency of the administration of justice, is to be found in the proper reverence for the sanctity of an *oath*."

See also *Sou. Coal & Iron Co. v. Schwoon*, 145 Tenn. 191, 227.

(b) Statements Made Inconsiderately Or By Mistake.

The Tennessee cases with one accord say "that if made inconsiderately or by mistake, the party ought certainly to be relieved from the consequences of his error." *Behr v. Conn. Mut Life Ins. Co.*, 4 F. 357, 362.

"Admissions or statements made under oath in a pending cause may be relieved against where made inconsiderately or by mistake." Michie's Digest, Vol. 6, p. 452, citing Harris v. Columbia Co., 114 Tenn. 328, 340, 85 SW 897; McLemore v. Charleston Ry., 111 Tenn. 639, 69 SW 338; Smith v. Fowler, 80 Tenn. 163, 171; Hamilton v. Zimmerman, 37 Tenn. 40; Seay v. Ferguson, 1 Tenn. Chy. 287, 295; Decherd v. Blanton, 35 Tenn. 373; Helm v. Wright, 21 Tenn. 72.

See also: *McEwen v. Jenks*, 74 Tenn. 289; *Ament v. Bremen*, 1 Tenn. Chy. 431; *Sanford v. Weeden*, 49 Tenn. 71; *Chilton v. Scruggs*, 73 Tenn. 308; *Anderson v. Norton*, 83 Tenn. 14, 31.

(c) Statement Must Be Wilfully False

A judicial estoppel is based upon bad faith and a sworn statement relied upon to establish it must have been made knowingly or with such a degree of negligence that the Court will impute knowledge to the affiant.

Broyles v. Scottish Union Ins. Co., 16 T. App. 331, 336.

As stated in *Black Diamond Collieries v. Deal*, 150 Tenn. 474, 477:

> "However, mistaken statements or such as involve an opinion, and are not the assertion of a fact

> do not raise an estoppel. The oath to be binding as an estoppel must be wilfully false."

Two of the most recent authorities requiring that the statement be "wilfully false" are the cases of *Schultz, etc. Co. v. Bell*, 23 Tenn. App. 258, and *State v. Amer-Bldg. & Loan Ass'n.*, 177 Tenn. 385.

(d) Necessity of Prejudice to Adverse Party.

It is true that judicial estoppel is based upon public policy and not upon prejudice to the adverse party. *Fidelity Trust Co. v. Norton*, 10 Tenn. App. 132; *Sartain v. Dixie Coal Co.*, 150 Tenn. 633; *Stearns Coal Co. v. Jamestown R. Co.*, 141 Tenn. 203; *Jetten v. Nichols*, 8 Tenn. App. 567. However, the courts are much more inclined to grant relief where the adverse party has suffered no prejudice.

As said in Michie's Digest, Vol. 6, p. 454:

> "But admissions or statements made in unsworn pleadings which have worked no detriment to the adverse party may be relieved against where made inconsiderately or by mistake. Harris v. Columbia Co., 114 Tenn. 328; McLemore v. Charleston R. Co., 111 Tenn. 639; Singleton v. Ake, 22 Tenn. 626; Hamilton v. Zimmerman, 37 Tenn. 40, etc."

In *Sou. Coal & Iron Co. v. Schwoon*, 145 Tenn. 191, counsel for the Coal Company in a tax proceeding before the County Court for a change in the assessment records so as to relieve his client from certain tax liability stated that it did not own certain lands. Later in the reported case it attempted to assert title to those same lands and Judicial estoppel was sought to be invoked.

> "We do not think the rule should be extended so as to bind the parties to the unsworn statements of their counsel where such statements are made orally by counsel in a wholly different controversy, and which are made in good faith, and which in no way prejudice the rights of others involved in the case where the doctrine is invoked." (p. 229).

Thus where an unsworn denial of a title in a pleading is more in the nature of a conclusion than a statement of fact, and is made inconsiderately, and without a due knowledge of the fact, the pleader is not estopped from asserting such title in a subsequent suit against a party not prejudiced by the former denial. *McLemore v. Charleston Ry.*, 111 Tenn. 639.

Further illustrative of the readiness of the Courts to relieve a party from the applicability of the doctrine is the case of *Harris v. Columbia Co.*, 114 Tenn. 328. In that case the plaintiffs in an action admitted in an unsworn pleading that one of them was a corporation. The trial court found that since that party was a foreign corporation, was a necessary party, and had not qualified to do business in Tennessee the action could not be prosecuted. The appellate court held that they were not estopped by the admission to show in a subsequent suit that it was made through an innocent mistake of fact, in the absence of proof of any detriment to the adverse party.

In the case at bar the proof discloses the fact that The Three Way Land Company, a corporation, was owned through its stock by Barton, Taylor and Highfill, therefore the Missouri suit could not have been brought otherwise than in the name of The Three Way Land Company as The Three Way Land Company had not been dissolved at that time. (Tr. pp. 555-556).

After the dissolution of the corporation on July 27, 1942 (Tr. p. 593) but before this remaining asset had been disposed of and distributed (Tr. p. 149) the present action was properly brought in the name of Barton individually and for the benefit of his associates, Highfill and Taylor, under the express authority they had vested in him (Tr. pp. 573-574) and for the benefit of their tenants from whom he held power of attorney (Tr. pp. 600-601). Therefore, the subject matter in both suits was the same; the parties in reality are the same; the relief sought in both suits was substantially the same, and no injury could, or has, resulted, and there is absolutely no inconsistency in prosecuting these actions.

As we have indicated in our Statement of Facts, appellee Fraser contends that an estoppel also arises out of another alleged inconsistency in these two actions in that the Missouri suit recites that the contract sued upon is predicated upon a letter of April 24, 1942, whereas the present action purports to be predicated principally upon a letter of April 2, 1942. Barton, in his testimony states that the letter of April 2, 1942, is the only letter which passed reciting an agreement for sale of the cotton at 15½c per pound. (Tr. p. 589). He further adds that the Missouri action was drawn hurriedly in order to obtain service of process while Fraser was in the jurisdiction. (Tr. p. 587). His uncontradicted testimony is to the further effect that they are one and the same letter and that the letter referred to in the Missouri action through oversight, mistake and inadvertance of the draftsman was incorrectly therein referred to as of April 24th rather than of April 2, 1942. (Tr. p. 589).

The Courts properly sustained both of these contentions on the part of respondents.

PETITIONER CONTRACTED WITH RESPONDENTS TO PAY THE GOVERNMENT PENALTIES

The Courts found that under the terms of the agreement with reference to the purchase of the cotton in question that petitioner Fraser and Britton were to pay respondents seven dollars per bale for their equity after discharging the loan and penalties and that this sum was to be *net* to them. While this agreement could not relieve respondents from any legal responsibility they might owe the Government with reference to liability for payment thereof it certainly fixes the question of liability between the parties.

This finding involves a question of fact amply supported by the evidence and it is not necessary to more than briefly refer to this. Both parties contend that the contract called for a sale of the equity but they differ with reference to the meaning of the term. Petitioner contends that it did not mean *net* above the penalties.

In addition to the correspondence heretofore alluded to, verbal testimony also upholds the contention of respondents and the decrees in their favor in this regard:

C. G. Henry, manager of the Mid-South Cotton Growers Association, which handles more loans in this territory than all other associations combined (Tr. 625) testified that it had a well known business meaning among cotton men and that by usage and custom the sale of an equity meant that the buyer paid both the loan and penalty on the cotton. (Tr. 628-630).

He also testified that Fraser told him that under his contract that he was to pay the penalty. (Tr. 631, 644)

Further that he, Henry, had offered Barton one dollar per bale above the loan and tax (631). Passing strange it would be if Fraser's contention is correct that he was to pay Barton $7.00 per bale and that Barton would assume payment of a penalty averaging $35.00 per bale—such a position is of course absurd. (Tr. 755, 809).

Another prominent cotton man, J. P. Norfleet, gave the same definition of equity as Mr. Henry. (Tr. 713)

Another witness, Wm. McDaniels, stated that Fraser told him in April, 1942, that he could handle the cotton in question at $7.00 per bale above tax and loan. (Tr. 685-687)

David Barton gave the same definition of equity as those above (Tr. 692). He further added that in a conference in March, 1942, Fraser offered his father, P. M. Barton, for their cotton $7.00 per bale above the loan and tax. (Tr. 688-689)

J. W. Luster testified that during the March, 1942, negotiations that he was called into a conference with Fraser and both Bartons as he owned six hundred bales of the cotton. That he authorized Barton to accept Fraser's offer of seven dollars above loan and penalty. (Tr. 698-699).

Barton was very positive in his testimony regarding his theory of the contract. (Tr. 576-578, 563-565).

Fraser on the other hand not only mis-appropriated and concealed the funds due appellants, and the Government, but refused to account to Britton even. (Tr. 875-876). On the witness stand his testimony was so unsatis-

factory and his answers so evasive that the Court remarked on the fact and took over his examination in an effort to elicit the truth with reference to several matters. (Tr. pp. 811, et seq)

In fact, it seems but fair and appropriate to direct the Court's attention to the fact that there is now pending before it this very petitioner's application to review a conviction of perjury arising out of his testimony in this identical case.

CONCLUSION

In addition to the above documentary and parol evidence and the manifest inconsistencies in the petioner's testimony and position there exists the fact that he is undertaking to convince this Court that from the *net* which Barton et al. were to receive of some $12,971.00, they were to pay a Government tax of $55,762.14. This is not only an absurdity, but a physical and financial impossibility. This is further indicative of the preconceived idea abinitio of Fraser to defraud respondents, his Government, and his own partner and which he so ineffectually attempted to disguise by the phraseology of his correspondence—neither of the Courts to which this cause has been submitted were deceived and respondents are confident this Honorable Court will see through his subterfuge and fraudulent scheme and device.

Respectfully submitted,

L. E. GWINN,
Memphis, Tennessee,
Solicitor for Respondents.

FRED CALLAHAN,
Memphis, Tennessee,

GRANVILLE FARRAR,
Memphis, Tennessee,
Of Counsel.

ACKNOWLEDGMENT OF SERVICE

Acknowledgment of service and receipt of two copies of reply to petition for writ of certiorari, statement of the case, brief and argument on behalf of respondents, P. M. Barton, et al.

This January 11th, 1945.

WM. McCLANAHAN,
U. S. District Attorney;

WILS DAVIS,

W. C. RODGERS,

W. H. FISHER,
Counsel for Petitioners.

No. [illegible]

In the Supreme Court of the United States

October Term, 1944

[illegible]

[illegible]

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF [illegible]

BRIEF FOR THE [illegible]

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Joint Resolution of May 26, 1941, 55 Stat. 203, par. (9), 7 U. S. C., Supp. III, 1340	12
Miscellaneous:	
7 C. F. R., 1941 Supp:	
Sec. 722. 342	12
Sec. 722. 343	8, 14
Sec. 722. 350	9

628289—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 805

WILLIAM FRASER, ET UX., PETITIONERS

v.

P. M. BARTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

No opinion was rendered by the district court. The opinion of the Circuit Court of Appeals (R. 977–987) is reported in 145 F. (2d) 139.

JURISDICTION

The judgments of the court below in the consolidated causes were entered on October 3, 1944 (R. 975–976). The petition for a writ of certiorari was filed January 2, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. 347).

QUESTIONS PRESENTED

The United States intervened in this suit as a cross-complainant. Its only interest is in recovering the marketing penalty imposed by the Agricultural Adjustment Act of 1938 as amended, on cotton marketed in excess of the producer's farm marketing quota. This brief will therefore deal with only the questions presented by the petition for writ of certiorari which relate to the right of the United States to recover such penalty. These questions are:

(1) Whether petitioner William Fraser was liable for payment of the marketing penalty claimed by the Government.

(2) Whether the court below correctly interpreted a Tennessee statute dealing with privileged communications between husband and wife as not extending to communications and acts in furtherance of a fraud.

STATUTE AND ADMINISTRATIVE REGULATIONS INVOLVED

The pertinent provisions of the Agricultural Adjustment Act of 1938, as amended, and of regulations issued thereunder by the Secretary of Agriculture are set forth in the Appendix, *infra*, pp. 12–14.

STATEMENT

P. M. Barton brought suit in the United States District Court for the Western District of Tennessee on behalf of himself and associates against

William Fraser and G. H. Britton, individually and doing business as G. H. Britton Cotton Company, for an accounting of the money due the plaintiffs on account of approximately 1,859 bales of cotton sold by the plaintiffs to the defendants, and to require the defendants to show why they had not paid to the United States the penalty on the marketing of the cotton prescribed by the Agricultural Adjustment Act of 1938, as amended, or had not placed in escrow a sum sufficient to pay such penalty, in accordance with the agreement of the parties (R. 3–9). Fraser and Britton claimed that under the terms of sale the sellers of the cotton assumed liability for any penalty due the United States under the Agricultural Adjustment Act of 1938 (R. 63–64, 86).

The United States intervened as a cross-complainant upon the ground that the cotton involved in the litigation was cotton marketed in excess of the farm marketing quotas fixed under the provisions of the Agricultural Adjustment Act of 1938, as amended, and that the cotton was subject under the Act to a penalty of 7¢ a pound payable to the United States, and that both the buyers and sellers of the cotton were liable to the United States for this penalty but had failed and refused to make the required payment (R. 10, 12–13). The cross-complaint averred that Fraser had received the proceeds of the sale of the cotton but had declined to give any information as to the whereabouts of

the proceeds (R. 14–15). The cross-complaint also averred, on the basis of an investigation which had been made, that the money received by Fraser from sale of the cotton had been deposited in a bank safe deposit box rented jointly by him and G. W. Fraser (his wife); that this money, which included funds belonging to the United States as a penalty, was being held and concealed; that Britton and the two Frasers were insolvent; and that unless the money so withheld and concealed was impounded the United States would be irreparably injured (R. 15–16). The court, as prayed by the Government, issued a temporary injunction restraining Britton and the Frasers from disposing of or concealing the proceeds from the sale of the Barton cotton or the contents of the Fraser's bank deposit box (R. 17–18, 21–22).

Upon application of the United States pursuant to Rule 26 of the Rules of Civil Procedure, the court issued an order allowing the taking of the deposition of William Fraser and issued a subpoena *duces tecum* requiring him to produce certain documents relating to the purchase and sale of 1,859 bales of cotton (R. 29–30). In his deposition William Fraser testified that, apart from the proceeds of the cotton sold by him, he did not have property subject to execution sufficient to satisfy any judgment against him for the penalty on this cotton (R. 375). He stated that he knew the location of approximately $30,-

000 of this money but refused to tell where it was upon the ground that his answer might involve the disclosure of privileged communications between husband and wife (R. 372–374). The court having directed the witness to answer, Fraser stated that his wife had possession of some $32,000 of the money but that he did not know where it was (R. 376, 379–381, 385–386).

The deposition of Mrs. Fraser was then taken and she admitted having on her person $27,000 in currency coming from the sale of the Barton cotton (R. 400). She testified that her husband had turned the money over to her to take care of, together with one $500 and two $1,000 bonds (R. 403–404). The parties then went before the court and it issued an order directing Mrs. Fraser to pay to the clerk of the court all of the proceeds derived from the sale of the Barton cotton which were in her possession, to be held by the clerk pending determination by the court of the rights of the respective parties in such proceeds (R. 56–57, 407–410). Mrs. Fraser thereupon turned over to the clerk of the court the $27,000 in currency and $2,500 in Government bonds, which were admitted to be proceeds from sale of the Barton cotton (R. 412, 414).

At the trial the evidence was conflicting concerning the terms of the agreement for the sale of the cotton, but the district court concluded that the buyers, Fraser and Britton, had agreed to as-

sume liability for payment of the marketing penalty (R. 151–152). Judgment was entered in favor of the United States for the amount of the penalty, $55,762.14, against the defendants Fraser and Britton, jointly and severally, against which there was set off $33,461 held by the clerk of the court,[1] which he was directed to pay to the United States in partial satisfaction of its claim (R. 161, 163–164). The court also adjudged that the plaintiffs in the suit, the sellers of the cotton, were likewise individually liable to the United States for the marketing penalty in proportion to their respective interests in the cotton, against which was set off their proportionate parts of the $33,461 in the registry of the court (R. 161–163, 164–166).

On separate appeals by William Fraser, Mrs. William Fraser, and by the original plaintiffs in the suit, the Circuit Court of Appeals approved the determination and rulings of the district court and affirmed its judgment (R. 975–987).

ARGUMENT

I

Petitioners contend (Pet. 18–19) that the seller from whom Fraser and Britton bought, the Three

[1] In addition to the cash and Government bonds deposited with the clerk of court by Mrs. Fraser, Britton and Barton respectively surrended to the clerk Government bonds and a cashier's check representing proceeds from the sale of cotton on which no marketing penalty had been paid (R. 58–61).

Way Land Company,[2] was the first purchaser from the growers of the cotton and that Fraser and Britton were therefore not liable, as purchasers, for the cotton marketing penalty. It was stipulated that the cotton was produced on and marketed from lands owned and farmed by the original plaintiffs (R. 106), and it is clear that the petitioners knew that they were purchasing penalty cotton from producers and not from an intervening purchaser (R. 107, 108, 434, 496, 690, 705–707). Furthermore, the contention was not made in the court below (R. 179–187) and will therefore not be considered by this Court on certiorari (*Burnet* v. *Commonwealth Imp. Co.*, 287 U. S. 415, 418).

Petitioners also contend (Pet. 16–18) that the court below erred in holding that the agreement under which the cotton was sold made the buyers liable for the marketing penalty. But this is a question of fact in which two lower courts have concurred. Certiorari will not be granted simply to review the evidence or the inferences to be drawn from it (*General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178) and, in the absence of a showing of clear error, this Court

---

[2] For convenience, we referred in our statement to Barton as the seller of the cotton. The Three Way Land Company, the nominal seller, was in process of dissolution at the time of sale and Barton, its president and one of its three stockholders, had complete power to liquidate its assets (R. 149, 557, 590).

accepts findings in which two courts have concurred (*Pick Mfg. Co.* v. *General Motors Corp.*, 299 U. S. 3, 4).

In the second place, the buyers of the cotton were liable under the statute for the marketing penalty irrespective of the terms of the agreement under which the cotton was sold. Section 372 of the Agricultural Adjustment Act of 1938 (*infra*, p. 13) expressly provides that the penalty with respect to the marketing of cotton "shall be collected by the buyer" and that all penalties shall be remitted to the Secretary of Agriculture "by the person liable for the penalty." The regulations issued under the Act by the Secretary (Sec. 722.343 (b), *infra*, p. 14) provide that the penalty with respect to the marketing of cotton by sale "shall be collected by the buyer at the time of sale."[3] The liability of the buyer for the penalty is emphasized by the provision in the regulations that the penalty due upon cotton "marketed in processed form" shall be paid by the producer or, if the producer and buyer so agree, by the buyer (*ibid*). As stated by the court below (R. 979), there must have been purpose and not inadvertence in thus providing with respect only to processed cotton that the party required to make

[3] The regulations also provide (Sec. 722.343 (d), *infra*, p. 14) that the penalty may be collected by the buyer either by deducting the amount thereof from the purchase price of the cotton or by receiving the amount thereof from the producer.

payment of the penalty might be fixed by agreement between buyer and seller.

Petitioners did not challenge in the court below the trial court's finding that Fraser and Britton knew that the cotton which they were purchasing was subject to the marketing penalty (R. 154, 181–185). It was also stipulated that Fraser and Britton made no report to the Government of their purchase of the cotton (R. 108), although required by law to make such report.[4]

II

Petitioners contend (Pet. 19–23) that the testimony which Fraser was required to give concerning his disposition of the proceeds derived from the sale of penalty cotton was inadmissible under a Tennessee statute barring testimony by husband or wife as to any matter which occurred between them in consequence of the marital relation, and that the money and bonds which Mrs. Fraser paid into court as a result of such testimony should therefore have been returned.

Petitioners do not dispute the statement by the court below (R. 983) that there are no Tennessee decisions construing the application of the statute to acts done in furtherance of a fraud. The court, in concluding that the testimony obtained

[4] As to their liability to report, see Section 373 (a) of the Act (7 U. S. C. 1373 (a)) and Sec. 722.350 (a), (b), (c), (j) of the Secretary's regulations (7 C. F. R., 1941 Supp., pp. 805, 806).

from Fraser was not within the bar of the statute, considered the public policy lying at the foundation of the rule making communications between husband and wife privileged and also considered decisions in other jurisdictions holding that courts, for the purpose of unearthing and exposing fraud, will permit testimony by husband or wife as to conversations between them concerning the transaction (R. 982–984).

The court below applied well-settled principles in determining the meaning of the statute in the absence of any guiding decision by the courts of the State. This Court will not set aside a ruling by the lower federal courts on a question of local law except on a plain showing of error. *Palmer* v. *Hoffman,* 318 U. S. 109, 118, rehearing denied, 318 U. S. 800; *MacGregor* v. *State Mutual Life Ass. Co.,* 315 U. S. 280, 281.

Since the decision below was rested on a ruling as to local law not shown to be in conflict with the law of the State, it is unnecessary to consider certain additional reasons which the court advanced in support of its ruling, namely, that Fraser had waived his privilege and that, in matters of remedial as distinguished from substantive rights, federal courts of equity are not bound to apply the law of the State of trial (R. 984–985).

Aside from the question of privilege already discussed, the order requiring payment to the court, pending final decision in the case, of the proceeds

from the sale of penalty cotton in the possession of persons unable, apart from such proceeds, to satisfy judgment against them, was clearly valid. *Mulford* v. *Smith,* 307 U. S. 38, 45; *H. P. Hood & Sons* v. *United States,* 307 U. S. 588, 591.

CONCLUSION

The decision below is not in conflict with that of any other circuit court of appeals or of this Court and no question meriting review by this Court is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MARY CONNOR MYERS,
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JANUARY 1945.

APPENDIX

Section 348 of the Agricultural Adjustment Act of 1938 provides in part:

> Any farmer who, while farm marketing quotas are in effect, markets cotton in excess of the farm marketing quota for the marketing year for the farm on which such cotton was produced, shall be subject to the following penalties with respect to the excess so marketed: 2 cents per pound if marketed during the first marketing year when farm marketing quotas are in effect; and 3 cents per pound if marketed during any subsequent year * * *. (52 Stat. 59, 7 U. S. C. 1348.)

The Joint Resolution of Congress of May 26, 1941, by paragraph (9), amended the above provision as follows:

> The marketing penalty for cotton and rice produced in the calendar year in which any marketing year begins (if beginning with or after the 1941–1942 marketing year) shall be at a rate equal to 50 per centum of the basic rate of the loan for cooperators for such marketing year under section 302 of the Act and this resolution (55 Stat. 205, 7 U. S. C., Supp. III, 1340.)

The Secretary of Agriculture, pursuant to paragraph (9) above, issued the following regulation establishing the penalty for the 1941–1942 marketing year at 7 cents per pound:

> SECTION 722.342. The rate of penalty for the 1941–1942 marketing year shall be 7

> cents per pound. Any producer who markets cotton in excess of the farm marketing quota for the 1941–1942 marketing year, or in excess of his share of such quota, as the case may be, shall be subject to a penalty of 7 cents per pound with respect to the excess so marketed whether the excess is cotton produced during the said marketing year or in any prior marketing year. All cotton which is not identified, as provided in Sections 722.311–722.360 at the time of marketing, as free of marketing penalties or which is marketed without the use of the means of identification prescribed by Sections 722.311–722.360 shall be taken to be in excess of the farm marketing quota, and the amount of the penalty to be collected thereon by the buyer or transferee shall be 7 cents per pound. * * *. (Code of Federal Regulations, Title 7, 1941 Supp., p. 800.)

With regard to the collection and payment of penalties, Section 372 of the Act provides in part:

> (a) The penalty with respect to the marketing, by sale, of wheat, cotton, or rice, if the sale is to any person within the United States, shall be collected by the buyer.
>
> (b) All penalties provided for in Subtitle B shall be collected and paid in such manner, at such times, and under such conditions as the Secretary may by regulations prescribe. Such penalties shall be remitted to the Secretary by the person liable for the penalty, except that if any other person is liable for the collection of the penalty, such other person shall remit the penalty. The amount of such penalties shall be covered into the general fund of the Treasury of the United States. (52 Stat. 65, 7 U. S. C. 1372 (a), (b).)

With respect to the collection and payment of penalties by the buyer of the cotton, the regulations of the Secretary provide:

> SECTION 722.343 (b). The penalty in connection with the marketing of cotton by sale to any person within the United States shall be collected by the buyer at the time of sale. * * * The penalty, if any, due upon cotton marketed in processed form within the meaning of paragraph (a) of this section shall be paid by the producer or, if the producer and the buyer or transferee agree, the buyer or transferee of the article of trade into which the cotton was converted may collect and remit the penalty.
>
> SECTION 722.343 (d). The penalty may be collected by the buyer by receiving the amount thereof from the producer or by deducting from the purchase price of the cotton the amount of the penalty due with respect to the marketing thereof. The penalty may be collected by the transferee by receiving the amount thereof from the producer. (Code of Federal Regulations, Title 7, 1941 Supp., p. 801.)

Section 376 of the Act (52 Stat. 66, 7 U. S. C. 1376) vests in the several district courts of the United States jurisdiction to enforce the provisions of Title III of the Act, of which the cotton marketing penalty is a part.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 805

WM. FRASER ET UX., Petitioners
VS.
P. M. BARTON ET AL., Respondents

REPLY OF PETITIONERS TO THE OPPOSITION BRIEF OF RESPONDENTS, P. M. BARTON ET AL

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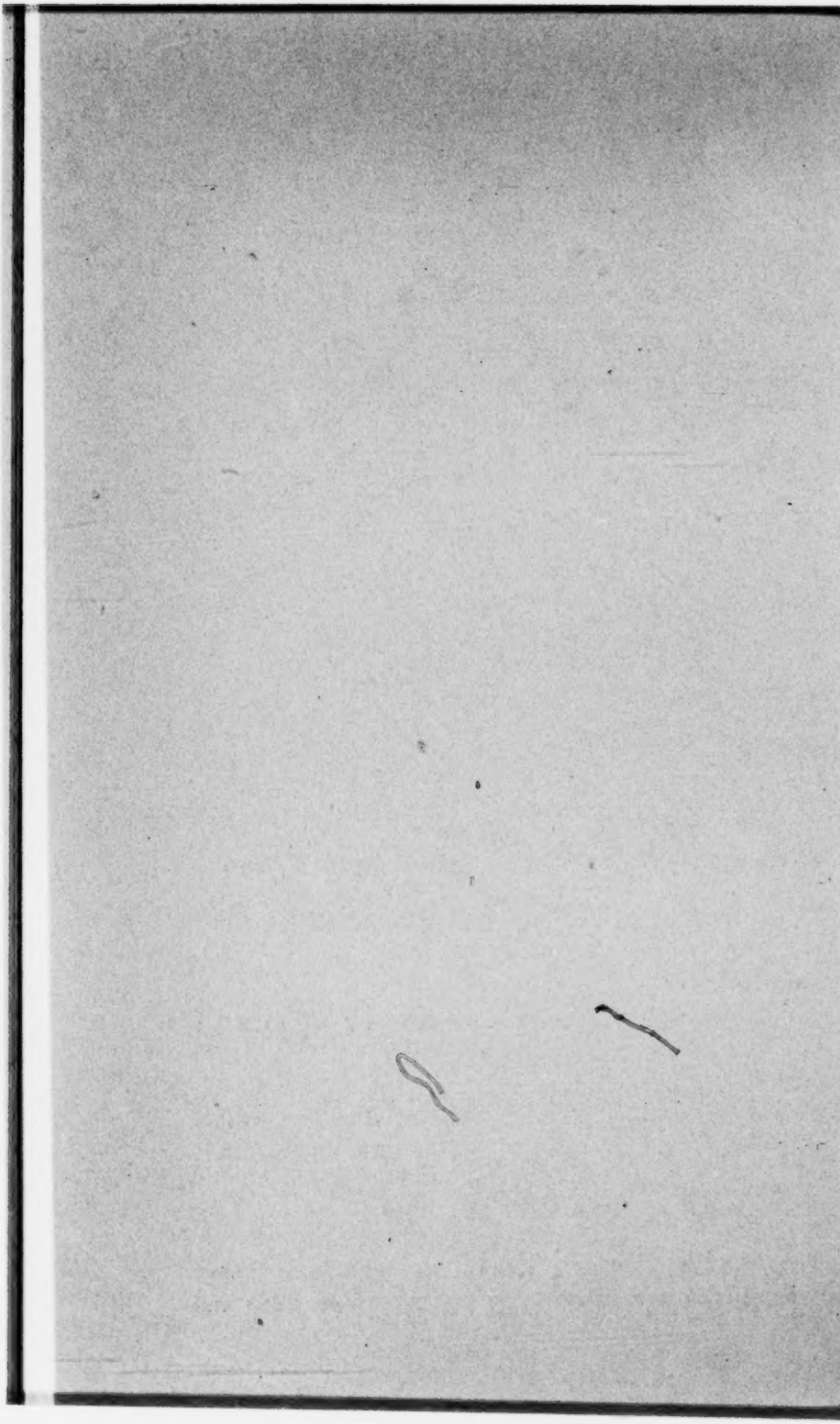
THE DAILY NEWS



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TO THE HONORABLE JUDGES OF THE SUPREME COURT:

Petitioners feel that a brief rebuttal argument will be of aid to the Court in reaching the real issues involved.

ESTOPPEL

The estoppel invoked against respondents is based upon a deliberate and purposeful change of the basis and

theory of their suit, made for the specific purpose of casting petitioner, Wm. Fraser, in the role of "first purchaser" of the cotton, an essential step in fastening on him liability for the collection of the tax.

The Three-Way Land Co. desired to step out of its role as first purchaser, and to further this purpose, a radical change in the parties to the litigation occurred. All this will appear from a brief history of the litigation.

1. In Missouri, Circuit Court of Madrid County, May 22, 1942, The Three-Way Land Co., the corporation, sued Fraser claiming that Fraser had sold the cotton for the corporation, and owed it $88,325, the proceeds less the loan.

R. 197-199.

"Title to the proceeds of the cotton in question was still in the corporation—"

Findings of Fact. R. 149.

2. In the United States District Court at Memphis, Nov. 17, 1942, P. M. Barton filed suit for The Three-Way Land Co., and its three stockholders, and for some 60 odd sharecroppers, or tenant farmers, in whom, it is now alleged, reposed title to Three-Fourths of the cotton.

R. 3.

3. If the title to that Three-Fourths interest was in the corporation, this meant that the corporation was the first purchaser from the growers, the tenants. So, to avoid the role of first purchaser, it was necessary to make the radical change in parties to the suit.

The mere fact that the corporation had surrendered its charter in July of 1942, was no reason why the cor-

poration could not have maintained the suit in its own name; because corporate existence continues for the purpose of winding up unfinished business, realizing and collecting assets, and ceases only so far as new business is concerned. Such was not the real reason for the change.

Note the confusion created in the minds of counsel and of the court. R. 592-595.

4. In the Missouri suit, and in the Memphis suit, and also in the intervening suit filed by the Government, the basic theory is that Fraser was a selling agent, and had sold the cotton for plaintiffs and had not accounted for the proceeds. R. 3-19.

There is nothing said in these pleadings about Fraser being a purchaser of the cotton, or owing the Government the tax because he purchased the cotton.

The stipulation leaves open the question of whether the transaction was one of selling agency, or outright sale of Fraser.

R. 108.

Fraser in his answer claims he was an outright purchaser, from the corporation, and from no one else; he knew no one else in the deal. See Stip. R. 106, Par. II of Stip.

Respondents through their counsel, Mr. Callahan, make concessions:

> "MR. CALLAHAN: They are probably the buyers of the cotton outright." R. 584.
>
> "THE COURT: You admit that they **bought** the cotton?
>
> "MR. CALLAHAN: **We can't deny it and we admit that they bought the cotton.** R. 537

"MR. CALLAHAN: That, your Honor, is the entire lawsuit. Just what the contract amounts to is that Britton (and Fraser) was to pay the tax either as the **first buyer** or the **second buyer.** We are bound to concede that he must be **the first buyer.** If he is, it is our contention that he is the collector of the tax." R. 539.

5. The reason for this radical change in the theory of respondents as plaintiffs in the suit, is that the corporation, which had sold this cotton to Fraser, is backing away from its situation as "first purchaser" of the cotton.

But this does not work because of the facts. The corporation owned title to the cotton, and sold same to Fraser. But the corporation was not the grower, nor original owner, but itself had purchased the cotton, and owed the tax, as first purchaser, and though it had made a practice of paying the tax to the Government, it decided to do otherwise for the year 1941, because the tax had advanced from 3 to 7 cents a pound, and this corporation was not paying the tax on any 1941 cotton, but was interested in a suit being brought to contest the legality of the advance of 4 cents a pound. All these matters clearly appear in the record, which we quote:

Testimony of P. M. Barton:

"A. I wasn't the producer. I didn't produce any of that cotton.

Q. You were the land-owner. You owned the land?

A. The land was rented out.

Q. You were the original owner of the cotton?

A. NO SIR, the land was rented out to tenants."
R. 599.

"A. The way we handled that in the gin business when we would buy cotton we would make a report every 15 days to the Government of the cotton we had purchased and who we bought it from and whether it was red or white card cotton and at the end of the season—I have never had a buyer question me about the tax—when we wound the gin season up we know the amount of tax on the cotton that we have bought. When we buy red card cotton we collect the tax against it. At the end of the season we figure up on all of the cotton we have bought and settle up with the United States Treasury Department for the tax.

* * * * *

Q. And you paid the tax on all penalty cotton you have handled or produced?

A. All except in 1941.

Q. You mean the Fraser cotton?

A. No, sir.

Q. The cotton involved here?

A. No sir, in 1941.

Q. Go ahead?

A. A bunch of farmers in Southeast Missouri—cotton was taxed by Congress four cents after the cotton was up and planted. Some 75 or 150 farmers—in fact I talked to you about it—they wanted to contest the four cents or let the Government sue someone, and we put that money in escrow."

R. 613-614.

This corporation kept all the red cards, the identification tags of penalty cotton.

> "Q. Did you have this red card with you at the time you made these deals with Mr. Fraser?
>
> A. The red cards were in the office at the time, Mr. Fraser was up there. We had a stack of them that high, because we have to settle—at the end of the season we keep them to know how much to pay."

The corporation kept these red cards and did not deliver to Fraser. See Findings of Fact.

> "P. M. Barton, acting in the capacity aforesaid, did not identify any of the cotton as being subject to marketing penalty even though red marketing cards for the farms upon which the excess cotton involved in this case was produced were duly issued by the appropriate county committee, and P. M. Barton had possession of, and full control over, such cards at the time of the sale of the cotton by him."
>
> Findings of Fact. R. 153.

Fraser bought from the corporation, and no one else, and the suit should have been filed by the corporation as sole plaintiff. But instead of such a straightforward suit, the action becomes distorted to this theory, that the 60 odd sharecroppers as plaintiffs sold cotton to Fraser and are entitled to a judgment against him. This distortion results in an impractical kind of a judgment against Fraser, one which, should he now decide to pay off, he would have great difficulty in knowing just whom he owed, and how much, or even in locating these plaintiffs whom he never saw.

> "It is further considered ordered and adjudged by the Court that the plaitiffs have and recover of and from the defendants G. H. Britton and William Fraser, individually and as partners under the firm name and style of G. H. Britton Cotton Company, jointly and severally, the sum of $12,971.00, being the aggregate of the agreed sale price of the equities in 1853 bales of cotton herein involved at the rate of $7.00 per bale; said plaintiffs' interest in said judgment and any sums paid thereon being in accordance with and in proportion to their respective interests in the cotton herein involved and as set forth in the stipulation of Facts filed herein."
>
> See Judgment. R. 166-7, Par. VI.

Why all this complication and confusion and an unwieldy host of plaintiffs?

Simply, that the corporation wants to delete the fact that it had become the first purchaser of the cotton, and to cast that robe upon the shoulders of Fraser. There is no hesitancy in redesigning the entire action, from change of parties to change of theories, in order to further this purpose.

We submit that such trifling with the courts is the basis for the very strongest kind of estoppel.

CONCLUSION.

In conclusion may we again remind the Court of the simplicity of Fraser's defense in the suit. It is that he bought cotton from the corporation at a certain price, all as shown in the letters written to, and acted on by Barton (Pet. 7-8), who could at any time have stopped delivery; that Barton enticed Fraser to Missouri and

brought suit, and when litigation began Fraser stood still, holding the proceeds he had, such as were not taken from him by court order, awaiting the termination of the litigation.

While maintaining this straightforward and simple defense, he has suffered continuous abuse and denunciation which characterizes respondents' brief in this Honorable Court. He, and his wife, have suffered the impact of supposed powers in the District Court to make mandatory orders.

Petitioner made a simple straightforward contract with the corporation. He has always been willing to carry that contract out in letter and spirit.

Respectfully submitted,

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(21)

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TO THE HONORABLE JUDGES OF THE SUPREME COURT:

We have recently filed a Reply Brief to the Opposition Brief of P. M. Barton et al, but the same was prepared before we were supplied with a copy of the Government's Opposition Brief and we now desire to reply to this.

I.

It is stated on pages 6-7 of the Government's Brief that the Petitioners are contending, for the first time in this Court, that the Three-Way Land Company, the Cor-

poration from whom Petitioners bought the cotton, was the first purchaser. We do contend that this seller corporation was the first purchaser, but we submit that we are not subject to the implied charge that it is an after thought first brought to notice in this Court.

This contention came out naturally in our efforts to deal logically with the exact holding of the Circuit Court of Appeals. See our Petition, page 18, Sec. 3-5.

As shown in our first Reply Brief, there was a distinct change of theory on the part of the Plaintiffs. The original Bill does not claim that Petitioner was a purchaser at all, to say nothing of being a first purchaser, but the Complainant, in the course of the trial, changed their theory by conceding that Petitioner was a purchaser, (R. p. 537), as he indeed claimed in his answer; but their concession undertakes to contend that he was a purchaser from the share-croppers, the growers, when that was not the case at all. He never knew the share-croppers and does not know them now.

The Stipulation cited by the Government conclusively establishes this fact. R. 106, paragraph 2 concluding sentence. This Stipulation does not show, as the Government contends, that Petitioner knew he was **purchasing penalty cotton from producers,** instead of from an intervening purchaser, but shows exactly the opposite, to-wit, that he purchased from a corporation, which, itself, cannot escape the roll of a first purchaser, and which recognized its responsibility for and actually assumed liability for the payment of these penalties. See letter of April 24th. R. p. 481.

It is further argued by the Government that Petition-

er relies upon this agreement to relieve him of the obligation for the penalty. The Learned Circuit Court of Appeals did not put it upon the basis of an agreement, but undertook to hold Petitioner on the grounds that Petitioner collected the tax by reason of the fact that he bought the cotton with notice. In our Petition, we addressed ourselves directly to that holding and argued, as we repeat, that Petitioner did not collect the tax, nor intend to do so, but simply bought cotton from a good and solvent corporation, amply able to respond to the Government for any tax it owed, and that Petitioner did not have notice in the sense that he knew that he was to be considered a first purchaser of the cotton, and for that reason, burdened with the obligation to collect a tax for the Government. This liability he expressly excluded by his letter, supra.

The simple facts are that he did not intend to bother with the tax, he did not do so, and he had no notice that he was expected to do so, especially when he was buying cotton from a thoroughly solvent corporation, amply able to respond to its obligations in the same manner as any other cotton trader might do on the market and should be able to do, to-wit, to go into the market and buy of solvent corporations cotton without having to see to it that such corporation had properly dealt with the original producers of that cotton.

We appeal to this Court to look closely at the pleadings and the concessions made in the course of the trial, feeling that an accurate and fair analysis of Petitioners' actions will sustain his contention, that he is simply in the roll of a purchaser of cotton on the market and had no duty whatever with respect to a tax.

In this view, Petitioner does not feel that he is in the least neglecting the rights of his Government because of the simple fact that the corporation that sold him the cotton was amply able to pay the tax. As to whether the corporation or Petitioner made the better trade, he feels that that is no concern of the Government, which could, by any simple suit, recover its tax in full, and was never under the necessity of intervening in this law suit to accomplish the collection of the tax.

II.

The Government, in its argument, seeks to justify the interpolation, for such it is, into the Tennessee Statute, protecting privileged communications between husband and wife, of an exception, which is not found in that Statute nor in any Tennessee decision, but which is to be put into the Statute in order to satisfy an idea that such a statute should not prevent the exposition of fraud and the discovery of concealed funds. There was much ado made about this in the Record. There was no charge of fraud, as fraud should be charged, but there was an attachment issued for lock boxes in banks in Memphis on the idea that funds were therein concealed. But an opening of the lock boxes revealed there was nothing to this charge whatever.

If this exception is allowed to be engrafted on to the Tennessee Statute it amounts to its repeal or nullification, because this means that it can at any time be neutralized by a mere charge of fraud, whether bona fide or fictitious.

Then the idea is pursued further that the mere fact that Petitioner and his wife have funds or monies on

their persons, proves that they are concealing these funds. If that be the truth, then every person who carries on his person any substantial amount of money, may be said to be concealing funds, and that is all that can be said about the Petitioners in this case.

Fraser had bought the cotton at a definite price, under an express contract, with which he meant to comply in letter and spirit. He had resold the cotton, as was his right, and was interrupted in the carrying out of his contract by the beginning of litigation which has not yet ceased. The mere holding of funds during this time cannot properly or justly be called fraud or concealment.

The charge that the Frasers were fraudulently concealing these funds and attempting to dispose thereof, is completely refuted by the fact that they had on hand and delivered into the Registry of the Court, every dollar of the proceeds of the Barton cotton which came into their hands, that is, the $27,000.000 in cash and the $2,500.00 worth of bonds.

As heretofore contended, there was no failure to account, or remit promptly, the facts are that Fraser and/or the Britton Cotton Company were in the process of accounting and remitting when they were sued in the New Madrid County, Missouri, Circuit Court. They had already delivered the first check of $2,715.00.

Therefore, good sense required that they discontinue further remittances or accounting until the Courts should determine the matter, and, particularly so, since the Three Way Land Company was contending in that suit for a completely different contract to that made, and which it, together with Barton, et al., later conceded was not the contract. R. pp. 537, 584, etc.

The Government, in its Reply Brief, brushes aside or ignores the fact, that the Three Way Land Company nor Barton had complied with the law or the regulations issued by the Secretary of Agriculture, by which responsibility is to be fixed upon the buyer for the penalty, that is, by presenting to the buyer the red cards which the seller is required to have the first buyer sign or execute. It would seem that this is a necessary prerequisite to liability on the part of the Petitioner Fraser, if his written contract, evidenced by the letter of April 24th, supra, is to be cast aside and nullified as is done by the Government in this matter.

In other words, this is the means and method by which the law and the regulations prescribe that notice of his liability or responsibility for this tax shall be brought home to him. And, it would seem, that unless this is done, the learned Circuit Court of Appeals is clearly in error in holding that he collected the tax. In the absence of this essential procedure, he had a perfect right to rely upon his contract of April 24th, aforesaid, expressly excluding this responsibility.

Respectfully submitted,

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